

**TITLE : CONSTITUTIONAL RATIONALISATION OF
LEGISLATION DEALING WITH TRADITIONAL
JUSTICE SYSTEM**

NAME : PHUMELELE. O. P NGEMA

STUDENT NO : NGMPHU002

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PLAGIARISM DECLARATION

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Phumelele Ngema (NGMPHU002)

Table of Contents

Chapter 1	1
Introduction	1
Chapter 2	3
Historical background, constitutional principles and pluralism.....	3
Historical background	3
Supreme law.....	7
Pluralism with opt out or opt in	8
Legality, ubuntu (dignity), pluralism and rule of law	11
Dignity and pluralism.....	12
Meaningful engagement and democracy	17
Separation of powers within legislative making process	19
Chapter 3.....	24
Implicated rights	24
Cultural and social rights.....	24
Personality rights	25
Political rights	26
Equality.....	28
Legal representation	30
Chapter 4.....	34
Traditional justice and Constitution.....	34
Law making process	36
Section 34 of Constitution and TCB	39
Customary law recognition.....	43
Role and position of traditional authority read in s34.....	44
Section 39(2) of Constitution.....	47
Traditional criminal jurisdiction	47
Concluding views.....	49
Chapter 7	52
Recommendations	52
Referendum.....	54

Conclusion	55
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Chapter 1

Introduction

My thesis addresses the question of whether an imposed traditional justice system operating through traditional courts is still relevant in South Africa. I interrogate whether traditional courts are necessary in a constitutional democracy outside of the existing western type courts system. The Constitution¹, in terms of chapter 12, recognises traditional leaders and enjoins government to enact national legislation that provides for the role of traditional leadership at a local level. As a unitary democratic state with diverse cultures, the Constitution also acknowledges and grounds diversity which could be interpreted as permitting legal pluralism.

I argue that the Constitution envisages recognition and application of the indigenous system within the existing courts of law and subject to the Constitution. Traditional leaders must be recognised in line with the injunction that customary law must be developed and applied by courts. Any other different construction on how traditional courts may be rationalised promotes the interest of traditional leaders and creates an unstable pluralist legal system enabling inequality and discrimination contrary to constitutional imperatives.

I question traditional courts' relevance in the context of rationalisation, envisaged by schedule 6 item 6 read with item 1 of the Constitution. Rationalisation is a process that should address the chaos created by apartheid and the discriminatory old order legislation. Parliament is conducting that process through enquiring whether legislation on traditional courts may be removed completely through repeal, or be amended to create consistency with the Constitution, or be replaced by completely overhauled legislation. The laws to be rationalised amongst others include, the Black Administration Act, 1927 (Act No. 38 of 1927) (BAA) with all its amendments, Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (Act No. 28 of 2005), Black Authorities Act, 1951 (Act No. 68 of 1951) Chiefs Courts, 1983 (Act No. 6 of 1983), Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No 110 of 1957), Kwa-Zulu Act on the Code of Zulu Law, 1985 (Act No. 16 of 1985), and the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (TLGFA).

After briefly setting out the historical background, I will analyse the relevance of a traditional justice system and a constitutional rationalisation by concentrating on the above arguments, and the constitutional provisions contained in section 7, implicated rights, sections 34, 39(2), 43, 44, 85, 143(1)(b), 156(1) and (2), 165, 166(e), 180, 195(b)-(e), 211, 212, 235, 237 and schedule 6 items 16(1), 6 of the Constitution. Due to the literature studied, the arguments made in this thesis may be confined to the Zulu and Xhosa contexts.

I argue that constitutional principles and doctrines must be complied with in order to sustain a democratic justice system. Chapter 3 discusses implicated rights. Chapter 4 discusses living customary law and the end product envisaged by the constitutional rationalisation, asking whether the Traditional Courts Bill (TCB)² as a legislative proposal is capable or not

¹ Constitution of the Republic of South Africa, 1996 (Constitution)

² In 2008 a Traditional Courts Bill [B 15 – 2008] was introduced before the National Assembly by Minister of Justice and Constitutional Development. In 2012 a similar Bill was introduced before the National Council of Provinces (NCOP) by the Select Committee on Security and Constitutional Development (NCOP Select Committee) on request of the Minister of Justice and Constitutional

of providing benefits of the law to those governed by it. The final chapter considers the implementation and effect of the relevant policies and provides recommendations concluding whether traditional courts are still relevant as courts of law or should be administrative alternative dispute resolution bodies.

My views flow from submissions to the National Assembly (NA) Portfolio Committee on Justice between 2008 to 2011, and those to the National Council of Provinces' (NCOP) Select Committee from 2012 to 2013, as public response to the TCB.

The TCB seek to recognise traditional courts according to the constitutional dictates. The TCB's preamble and objectives argue that it is perfect to enable cheap accessible mechanisms that provide people with experience and access to justice using other dispute resolution mechanisms. In my thesis I seek to navigate whether the Constitution allows recognition and application of customary law or does it enable the establishment or continued existence of traditional courts, with the likelihood of creating a discriminatory dual legal system as purported in the TCB. I argue that traditional courts recognised as courts that possess judicial authority are contradictory to constitutional values and chapter 2 of the Constitution. I argue that proper constitutional interpretation construes a meaning that does not give the state power to operate a system that is contradictory to the Constitution at the expense of people's rights.

Sindiso Mnisi Weeks³ lists five major focuses of controversy, which are also entertained in this thesis. She lists the inadequate consultation of rural people, recognition and constitution of customary courts, jurisdiction, exclusion of legal representation, and affected rights and courts' powers of sanction. My concluding chapter finds no justification to rationalise legislation on traditional court jurisdiction other than repealing the old order legislation and providing infrastructure that maintains and enables traditional courts, not as courts of law, but as administrative bodies in terms of the Promotion of Justice Act, 2000 (Act No. 3 of 2000) (PAJA).

Development and was referenced as Traditional Courts Bill [B 1 – 2012]. The two bills are similar in every sense except the introduction to Parliament method and shall therefore be referred to as TCB.

³ The Traditional Courts Bill: Controversy around process, substance and implications, at page 5, SA Crime Quarterly No 35, March 2011.

Chapter 2

Historical background, constitutional principles and pluralism

Chapter two covers the historical background, constitutional values and principles applicable to the rationalisation of traditional courts.

Historical background

Prior to the 17th century, indigenous people occupied the land without white settlers⁴. Those indigenous people were subject to traditional authority which transcended to a customary system able to maintain and achieve social stability. The traditional justice system of the aboriginal Africans⁵ promoted fairness principles, retributive justice⁶ and communal interests⁷. Aboriginal Africans include the Bushmen, Hottentots, (Khoisans), Abe-Nguni, Xhosas, Zulus, Sothos, Vendas⁸. In 1806 to 1819, Sir Charles Somerset brought the segregation between blacks and whites by proclaiming reserved areas for blacks only⁹. It was colonialism's and apartheid's failure to address multi-ethnicity¹⁰ that led to segregation laws.

Initially Africans were severely subjected to the whites' legislatures¹¹ and complete representation by whites. In this sense I use the word aboriginal sharing a similar meaning as indigenous and being mindful of the use of this term and contestations in entitlement claims in relation to property rights of indigenous people¹².

Davidson¹³ argues the genealogy of the African people from tribal chiefs and says ancestors "began African's lives and brought Africans into the lands where Africans still live" today. This statement informs that some African landscapes were mostly uninhabited until the aboriginal people for different reasons were forced to find permanent shelter all over Africa. Tribal wars and migration did not cause people on the move to lose identity, sense of belonging or human shelter. It is forced labour migration and colonisation that created overlapping between tribes for survival purposes hence today we observe overlap in cultures and customs and tribalism¹⁴ and created problems for the self identification.

⁴ Chapter 2 page 10, Satyagraha in South Africa.

⁵ BAA section 35 defines blacks to include persons who are members of any aboriginal race or tribe of Africa.

⁶ R v Joyce Maluleka CC 83/04 (T)

⁷ Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) BCLR (CC) (Bhe) at para 75

⁸ I include nations represented by the official languages mentioned in section 6 of the Constitution with the exclusion of English and Afrikaans. Indians were taken as immigrants as alluded in Essop v Union Government 1913 CPD 135

⁹ Effected by the Representation of Blacks Act, 1936 (Act No. 12 of 1936): The indirect black representation in Parliament came to an end through Promotion of Black Self-Government Act, 1959 (Act No. 46 of 1959) which repealed the Representative Act. Shrima Nayaran, The selected works of Mahatma Gandhi (3), Satyagraha in South Africa, 1968

¹⁰ Martin Chanock, Culture and human rights: orientalisng, Occidentalising and authenticity, 2000, page 20

¹¹ JJ Cloete, Parliaments of South Africa, J.L van Schaik, 1985 at Chapter 1.

¹² A Claassens, The resurgence of tribal taxes in the context of recent traditional leadership laws in SA, (2011) 27 SAJHR

¹³ Basil Davidson, The Africans: An entry to cultural history, Longman, 1969 at Chapter 5

¹⁴ Chanock:29:2000

Tribes brought a sense of affiliation, association and continuity to communities at tribal settlement¹⁵. This process for the formation of tribal settlements is the same as that defined by Maine, the ancient American anthropologist¹⁶. The basic theory that Maine espoused is that primitively the societal setting stemmed from kinship which lead to family units forming a collective unit that eventually became a village which transcended to being a society or tribal settlement in this context. Maine states that the creation of modern nation- state came about as a result of the social pact when the insiders of the village permitted the outsiders to come in and form part of the territory. Maine argued that the social compact was primitively non-existent as kinship kept societies together; instead it was a product of gradual replacement of the kin-based association that resulted in the modern-nation states and the resultant territorial ties.

In the South African context in respect of the Africans, the kinship also created and maintained the known tribes together with the ancient traditional leadership authority. The 1927 Native Administration Act and the Bantu/Black Authorities Act of 1951 created the "government elected chiefs" which creation was limited to those original chiefs willing to be obedient to the government of the day. The functions of the Chiefs were then outlined in the BBA; outside the actually traditional functions performed by the chiefs, and had the sole purpose and element of promoting the government of the time's agenda and administration. It was at this time that genuine self traditional government was distorted as at the introduction of the Bantustan administration by British government-obedient chiefs¹⁷. It was during this time that political disappointments experienced by the traditional settlement people over the traditional leaders' authority brought about the expansion and divisions of the African tribes but somewhere all share one founding ancestors and hence similar beliefs and customs¹⁸. This was also the time where political domination and political struggle among black people took place.

The political disappointments necessitated the parting of tribes from unionised aboriginal Africans and that created the impossibility to establish uniformity¹⁹ in traditional systems. But that is a legal challenge to be addressed when attempting to regulate uniformity for a traditional justice system. People still know who they were and how they customarily live their lives today. The codified customary law living or dead²⁰ continue to create frustration and division amongst people especially where government does not accord equal cognisance solely based on the location.

The British government processes or the incorporation and promotion of the common law lead to the disrespect and caused the death of customary law²¹. It is the European/universal

¹⁵ Defined by BAA as any area where persons reside according to indigenous law. Davidson says 'every group needed to define itself in order to believe in itself.' Even research has confirmed such phenomenon. This explains the undisputed existence of clan names and heritage. Traditions are interwoven.

¹⁶ The work done by Henry Orenstein, *The Ethnological Theories of Henry Sumner Maine*.

¹⁷ Gatsha Buthelezi Chief With A Double Agenda, Mzala, 1988, Zed Books Ltd, London and New Jersey, page 77.

¹⁸ *Black Leaders in Southern African History* (ed) Christopher Saunders, Heinmann Educational Books, 1979 and J Soga, *The Amakhosa life and customs*, Lovedale Pres, page 41-48. Soga discusses tribal equilibrium as the crucial object for Bantu law.

¹⁹ Bhe para 87 illustrating how customary law lacks uniformity.

²⁰ Aninka Claassens, *Entrenching distortion and closing down on spaces for change: Contestations over land and custom in South Africa*, chapter 2, 2012

²¹ SALRC argued that customary law was last reviewed in 1984 when the Natal Zulu Law Code was revised.

law style that brought distortion to the South African customary law through the official customary law fossilised²² and stone walled. If indigenous legal systems were officially protected and infrastructural developments available, customary systems might not be suffering the distortion it does.

The European influence to indigenous ways sowed seeds during annexation wars and defeat of the African and Khoi or Sans' leaders when they gave in to the subjection of white rule. Prior and during colonisation and apartheid regimes, the traditional justice system did achieve unimaginable strides in maintaining stability and peace in rural tribal areas.

Today with democracy and constitutional principles promoting governance by a legitimate government elected by the people, and without unfair segregations, a traditional leadership system may not have space but an inclusive and efficient government equally inclusive of tribal settlements leadership is necessary. As the Constitutional Court²³ found national government has been granted power and authorised by section 212(1) of the Constitution to "qualify the democratic principle at local government by infusing an element of traditional leadership into the democratic local structures", I find no reasonable juncture in leaving traditional courts to function as courts, whilst the Constitution is clear that traditional leadership must be subsumed into the local government sphere and not be a stand-alone whether it administers justice or as an executive organ. It must however be stressed that traditional leadership is not a democratically elected part of the local government²⁴ but it must be infused into local government sphere as dictated by the relevant legislation.

The question of what is customary law or indigenous law is debated extensively. Since for my arguments I take that known and recognised customs are the customary law, I accept the definition from the Oxford Companion to Law²⁵, which defines customary law as customs, usages and practices that deserve the name customary law when they are sufficiently fixed and settled over a substantial area, known and recognised and deemed obligatory, as much as are systems of law based on written formulations of rules. The Constitutional Court²⁶ has interrogated what is customary law and found that it is the living law of the indigenous people. It is living because it is capable of evolving with the changing lives of the people whom it governs. Today the customary law must exist subject to the Constitution.

The South African's indigenous system has no dichotomy between civil or criminal liability. Hence before white people settled in Africa there was no need for special education to distinguish a *meum* from *tuum* words' plain meaning is right from wrong. The people learnt what is wrong from the peculiarities of their everyday experiences²⁷.

Duff notes that civilisation, arguably came to Africa with the English men and intended to create and intensify divisions in the community. Duff²⁸ quotes Chanock who advocates that all societies had laws and means to settle their disputes, though those means would not

²² Gumede v President of RSA 2009 (3) BCLR 243 (CC) para 20

²³ In Re: Certification of the Constitution of the RSA, 1996 1996 (10) bclr 1253 (CC) at para 404.

²⁴ See para 403 of fn 22.

²⁵ The Law of South Africa (32), Indigenous Law, Lexis Nexus, 2004, fn 2 at page 6, Regspluralisme 2-3 by Olivier.

²⁶ Richtersveld, Bhe, Shilubani v Nwabitha 2008 (9) BCLR 914 (CC) or 2009(2) SA 66 (CC) and Gumede.

²⁷ H L Duff, Nyasaland Under the Foreign Office, London George Bell and Sons, 1903, 330

²⁸ Duff: 334

necessarily be similar. I favour that view. Others²⁹ have argued that the African legal ideas and methods were essentially the same as elsewhere.

Apartheid government continued the dismantling and distortion of the traditional systems which had already been introduced and implemented by the British colonisation systems. The customary law distortion is thus due to government pressure against traditional tribes and their leadership, the internecine wars³⁰ and colonisation³¹.

The urbanisation brought about by white settlers, forced labour and emigration all resulted in government structures that created divisions amongst African people both in rural and urban areas. Apartheid and colonialism bred "official" customary law whilst there has always been recognised and legitimate "living customary law", the proper indigenous justice system³² which government of that time arbitrarily failed to develop. Social changes could not be ignored during a continued political struggle and regulation of customary law matters³³, hence the preference of "living customary law", bearing in mind that even "living customary law" to some degree, has been influenced by the officialised fossilised customary law.

Colonisation utilised "indirect rule or rule by association" in order for the colonisers, as the minority and foreign rulers, to obtain control and rule over the majority indigenous people³⁴. The result of indirect rule was the government's official customary law which disregarded people's living customary law.

The majority indigenous people were forcefully turned into foreign natives³⁵ in their own country because during colonisation black people were stripped their governing role where they stayed and generally throughout the country. Apartheid and colonisation manifested racial segregation and unfairly marginalised the ways African people used to maintain order. The imposed European regulation systems that were forced on Africans took away the inclinations³⁶ to maintain their identity, unless blacks were sufficiently knowledgeable to utilise common law to their advantage and fearlessly engage in political struggle. The end result of colonisation and apartheid was the current legislative institutions reminiscent of the European or British style governance without so much influence from Africans, since black people were excluded from effective governing and influencing the government meaningfully³⁷.

Democracy and general elections in 1994 saw South Africa become a unitary sovereign state³⁸ founded on democratic values with principles embodying the rule of law, equality,

²⁹ Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia*, Manchester University Press, 1955, page 2.

³⁰ J H Soga, *The South Eastern Bantu chapter v*, Witwatersrand University Press, 1030.

³¹ Chanock in addressing how human rights and universalism came about where there has been serious conflicts within societies.

³² Bhe and 1996 Certification judgment

³³ Bhe paras 80-81.

³⁴ L Ntsebeza, *Democracy Compromised: Chiefs and the Politics of Land in South Africa* at page 17 and Ribot JC (2001) *Local Actors, Powers and Accountability in African Decentralisations*

³⁵ Larbi-Odam and others v MEC for Education and Another 1997 (12) BCLR 1655 at para 19.

³⁶ Bhe para 66.

³⁷ See the ANC letters written by the National Secretary Mr O.R Tambo around 1955 addressed to all provincial secretaries of ANC, which seek to address the way forward of traditional authorities without accepting the impose Bantustan administration.

³⁸ Section 1 of the Constitution, *EThekweni Municipality v Ingonyama Trust* CCT 80/12 at para 4 with reference to Schedule 1 of the Interim Constitution Act 200 of 1993 (IC) and KwaZulu-Natal Amakhosi

respect of inherent human dignity and a state that facilitates citizen participation. The Constitution is the only supreme legal order³⁹ that all South African citizens aspire to respect and permit through the rule of law to guide the society. The Constitution in sections 211 and 212 recognises traditional leadership and customary law and stipulates that the roles of this leadership need be determined by national legislation. Currently Parliament seeks to rationalise legislation on traditional courts, which forms part of the traditional leadership, through a proposed legislation called Traditional Courts Bill (TCB).

The application and litigation of western law concepts was reserved for the Native English Courts where blacks' disputes were addressed. Colonialism made a distinction between courts of law called the Native English Courts applying the western law to the African people and the chief's/natives courts which applied customary law to blacks only. The native courts dealt with minor transgressions as seen from the jurisdiction determined by BAA and the Schedule to TCB. Dlamini⁴⁰ argues that section 1 of the Law of Evidence Amendment Act, 1988 can be construed to provide that indigenous law can be applied to white people. This construction if accepted may address the restriction and limited application of customary law contrary to the Constitution, as that may lead to prohibited unfair discrimination.

Section 1(4) of the Law of Evidence Amendment Act defines indigenous law as law or custom applied by Black tribes in the Republic. The Draft Policy Framework for the alignment of the traditional justice system with the Constitution (Draft Policy on Traditional Justice) seems to recommend the same⁴¹. However, this policy and TCB bear testimony to the lack of appropriate profound recognition and national uniform application of the living customary law.

Supreme law

Constitutional supremacy and rule of law dictate that state power must be conferred by the Constitution, legislation in order to pass the legality principle and constitutional prescripts. In *Alexkor Ltd v Another Richtersveld Community and Others*⁴² (Richtersveld) the court confirmed the status of customary law. It confirmed that indigenous law need no longer be viewed through the common law lens but on its own as an integral part of our Constitution. Construing the proper interpretation and the place for customary law, the Court said⁴³, just like the common law or any other law, the customary law force and validity can only be found in the Constitution. Customary law is operated by traditional authorities and found in tribal settlements where it evolves with its community and is passed from generation to generation through practice⁴⁴. National and old order legislation has made traditional leadership a

and Iziphakanyiswa Amendment Bill v Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995 at para 38.

³⁹ Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (Pharmaceutical) at para 33 and 44.

⁴⁰ Bill of Rights Compendium, Butterworths at Chapter 6, Charles Dlamini

⁴¹ Published March 2009 and accessed at www.justice.gov.za in December 2013. Part 6 at page 34, point 6.6.6.

⁴² 2003 (12) BCLR 1301 (CC) at para 51 and 45 of Bhe.

⁴³ Richtersveld para 51

⁴⁴ Ibid para 53

creature of statute⁴⁵. In that light, the Constitution is permissive to both the western law system and the indigenous law⁴⁶ system.

The constitutional founding values⁴⁷ promote peace, order, substantive equality; the rule of law and diversity in South Africa. The Constitution enjoins equality for all before the law. The obvious intent out of a fair justice system is to instil equilibrium capable to maintain a stable society for the benefit of its citizens. The Constitution appreciates the diverse cultures through providing recognition to all South Africans' lifestyle⁴⁸.

This chapter argues in favour of constitutional supremacy which is inclusive and sensitive to the diversities of the rainbow nation. Our Constitution envisions cultural diversity which prosper in a single supreme system that subsumes past common law, traditional laws, or other African law⁴⁹ or folk law⁵⁰ without sidelining any culture, and diversity that exists.

Pluralism with opt out or opt in

The preamble to the Constitution, stipulates:

...people of South Africa believe that South Africa belongs to all who live in it, **united in our diversity.** ..⁵¹

The above-statement envisions a society where different cultures are tolerated and can unite the nation to create an egalitarian South African national identity. The intent and aspirations of this statement, illustrate a bigger place for recognition of many living justice systems.

According to *Shilubani v Nwamitha*⁵², the Constitution enables a parallel application of customary law with the Constitution subject to customary law remaining compatible and compliant with the Constitution. Without generalising a complete favour by all tribal settlements to traditional authority, I accept that traditional courts cannot be wished away. However, even people in rural areas are constitutionally vested with rights to self-determination, to citizenship, to voluntary cultural practices, freedom of movement and residence, political rights to elect constitutionally recognised legislative bodies, and the right to access courts and claim fulfilment of obligations and duties of the state adumbrated in section 7(2) of the Constitution in the same way as elsewhere.

The relevant old order legislation⁵³ and the Constitution provide legal permanency to indigenous justice system consistently with the rule of law requirement to obedience to law and acknowledge the pluralist nature of our society⁵⁴. A legitimate legal system must at all times be respected for as long as it is law. Customary law is law recognised by the

⁴⁵ The 1927 Native Administration Act and the Bantu/Black Authorities Act of 1951 are the origins of this statutory creation contrary to existing customs and beliefs.

⁴⁶ Refers to customary law of black people as the law of aboriginal people in SA, *Dlamini*. Para 148 Bhe.

⁴⁷ Section 1 of the Constitution

⁴⁸ Bhe para 43-45

⁴⁹ Is the collective term for all non-western and non-Islamic legal systems within Africa.

⁵⁰ Is the term used occasionally to umbrella the unwritten legal systems of developing societies in Africa, Asia, Central and South America. African law and folk law are terms explained by Olivier fn 25.

⁵¹ Lines 7- 8 Preamble to the Constitution.

⁵² 2008 (9) BCLR 914 (CC) or 2009(2) SA 66 (CC)

⁵³ See fn 45

⁵⁴ Bhe para 72 and 74

Constitution. In as long as it is implemented and administered in line with the Constitution, it must be respected despite the fact that it may result in plurality⁵⁵.

I will centralise my arguments on 'Southern African morality'⁵⁶ appreciating the meaning of "ubuntu botho" wherein Zulus translate it to "umuntu ngumuntu ngabantu, or literal translation "A person is a person through other persons", also the maxim "chief is a chief because of its people". These words dictate that each individual human being 'must develop ubuntu, humanness, personhood or virtue, through certain kinds of communal relationships and legitimacy. Hence I argue for a collective recognition of the indigenous justice system without discrimination on its applicability.

People in rural and traditional areas must enjoy indigenous lifestyles by following recognised self-regulation⁵⁷. Citizens wishing to live according to customary law must benefit equally in the protection advance by law, and must have access to any court they choose. Their customary disputes must be resolved by the application of recognised living customary law and appropriate litigation where necessary as inducted by s34 of the Constitution.

The Constitution does not empower any government branch to outsource or delegate⁵⁸ the implementation of proper justice⁵⁹. Where the state empowers a different justice administration system by granting civil and criminal jurisdiction to traditional courts for limited areas, the end result is an unconstitutional outsourcing or delegation because it is based on discriminatory grounds by virtue of colour and location. Even if the judiciary functions delegated to traditional courts is in terms of section 34 of the Constitution, the outsourcing of administering justice to traditional courts must be appropriate, precise and done through a clear regulatory framework.

To some degree my thesis will interrogate the TCB's objects and whether the purported regulatory framework is not likely to result in an unfair dualistic system. Furthermore I will attempt to scrutinise whether such dualistic system does enable the elements of opt in or opt out or whether it is imposed unfairly.

The recorded experiences already illustrate that TCB's intended objectives, may not be met considering that people's rights are already violated through the existing traditional court's system.

The Bill of Rights (BOR) is the cornerstone of our democracy. The shared common values, constitutional principles and the BOR sanction equal prominence and recognition of customary law because South Africa through its supreme legal system recognises, promotes and enables diversity.

⁵⁵ Chief Justice Langa whilst DCJ in *Bhe* judgment at para 46 said, which I concur, "It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."

⁵⁶ Thaddeus Metz' term in *The Reach of Amnesty for political crimes: Which Burdens on the Guilty Does National Reconciliation Permit?*, (2010) 3 Constitutional Court Review at page 253 and para 37 of *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

⁵⁷ Self-regulation promoted through enabling self-determination entrenched in CP XII stipulates as follows:

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

⁵⁸ Fn 11 and 17, Claassens and para 6.6.15.1 of the Traditional Justice Draft Policy at page 36.

⁵⁹ S 180 Constitution

According to Venter, law is intended to disharmonise and destroy disorder⁶⁰. Legislation is initiated through policy making and becomes enacted by the empowered legislatures into law. The initiation of policy and law making process is the start and means to an end that seeks to maintain order. There is nowhere else now that law makers derive authority to make law other than from the Constitution. Traditional leaders derived the authority to make customs, which in turn becomes customary law through practice and lineage, from the people that they serve and who follow such established practices or customs. Venter nicely clarifies that for the law to exist there must be a community where order needs to be fostered. Thus Venter⁶¹ says 'a community is a plurality of persons having something in common.' The people in tribal communities following a traditional system are a legal community worth the protection of the law and appropriate application of their customary law.

I argue applying constitutional principles that it is wrong to reject customary law, and not develop it to be the law respected by all, protected and advanced by the state through available state resources in the same way it is done for the western based type law. It is equally wrong in recognising customary law, for the state to only take care of the traditional leadership and not traditional citizens. The tribal settlement citizens, as a *legal community*, share a need for a protected, efficient and effective legal order system. It is unconstitutional⁶² to enable customary law to operate differently from established courts of law and to discriminately apply to certain people. The plurality that may result from application of customary law is not constitutionally precluded as long as it is not discriminately and contrary to the Constitution.

The associational right in a tribal settlement grounds solidarity which is difficult to separate from identity. This is a free will right⁶³, hence even the application of customary law if it is done outside the courts of law, it must be optional and permit free will choices, the principle of opt in or opt out inclusive of white people preferring to settle in rural areas and be governed by traditional authority.

South Africa, as a sovereign state, has equal powers and duty to tribal settlements as in urban communities. Laws of the country need therefore, to be consistent, uniform throughout and apply nationally as long as there is proper jurisdiction and infrastructure to give effect to justice administration following the supreme law. The principle of opt out and selective application of customary law through traditional courts is inconsistent with the Constitution and principle of plurality.

Others have argued that there is a need for "opt out" or "opt in" options. I may interject and say perhaps such notions promote the colonisers' position where the "detrified" Africans could petition the Governor and get exemptions from the rule of traditional leaders and customary law⁶⁴. The difference between this exemption and opt in or opt out is in the personal choice with no legal requirements whereas with the Governor exemption to be legally valid someone in authority had to grant it. In my view customary law should be incorporated into all legal systems and apply to all equally regardless of colour and location.

⁶⁰ Venter Francois, Constitutional Comparison, Japan, Germany, Canada & South Africa As Constitutional States, Juta and Kluwer Law International, 2007 at page 3.

⁶¹ *ibid* page 4.

⁶² Harksen v Lane NO and Others 1997 (11) BCLR 1489

⁶³ CP XII

⁶⁴ Bennett: 38.

In *Pilane v Pilane*⁶⁵ the court illustrated an appropriate constitutional opt in and proper pluralism which rather the TCB should have adopted.

The ordinary dictionary meaning and in terms of the checked English dictionaries⁶⁶ opt out and opt in means nothing more than having a choice to choose either to be part of an activity or not to be part or even once you have been part, to still have an option to decide to stop being involved in that activity. Collins dictionary defines “opt” to show preference for or choose to do something. In the implementation of justice the main principle must be the interest of justice. In the test for opt in or opt out instances there is no requirement that the applicant must show exceptional circumstances as pointed out it is just a matter of personal choice⁶⁷.

Legality, ubuntu (dignity), pluralism and rule of law

Legality dictates that state conduct or exercise of public power must be lawful⁶⁸ and rational⁶⁹. Rule of law or constitutionalism centralises the conception that government branches may exercise no power and perform no function beyond that which the law confers upon its state functionaries.

The South African democratic society's crucial principles are supremacy⁷⁰ of the Constitution, rule of law, separation of powers⁷¹, legality, democracy and respect for human dignity⁷². There should be a distinction between law and politics but that rarely occurs today. I concur, “the rule of law is based on the assumption that “political questions” and “legal questions” can be separated so clearly that the distinction can form the basis of practical solutions in litigation before the courts. This is an unrealistic assumption.”⁷³ This quote illustrates the intricacies of a normative law system and how huge a task it is to ever answer which law is proper and which is appropriate and necessary and what “are the motivational sources for maintaining existing law or for changing it” in a multi-party and multi-cultural democratic country like ours.

Eloquently said about the rule of law, are the words of Justice Skweyiya⁷⁴:

“The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of

⁶⁵ Para 35 of the Constitutional Court judgment and paragraph 21 read with 23 and 24 of the North West High Court case no 263/2010 judgment.

⁶⁶ Cambridge Dictionary on internet, www.macmillandictionary.com, Collins English Dictionary and *Mukadam v Pioneer Foods SCA* at para 12. *Mukadam v Pioneer Foods* 2013 (5) SA 89 CC or 2013 (10) BCLR 1135 (CC) para 23,28, 29 and 31.

⁶⁷ *Mukadam* (CC) para 55.

⁶⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at paras 58-9

⁶⁹ Harksen, the rational connection between the legitimate government purposes to the resultant law.

⁷⁰ CP IV and section 2 of the Constitution.

⁷¹ CP VI.

⁷² Human dignity as ubuntu is a right, value and a categorical constitutional imperative. See Ackermann, *Human Dignity: Lodestar for Equality in SA*, Juta: 95.

⁷³ Sims principle from *R v Home Secretary ex parte Simms*, the Lord Hoffman judgment observes that democratic legislatures possess ultimately the political and not so much the legal judiciary authority where the principle of legality means that Parliament must confront all its obligations and accept whatever political cost its decisions may bear.

⁷⁴ *Nkosinathi Khumalo and Others v MEC for Education: Kwa-Zulu Natal* CCT 10/13 [2013] ZACC 49 at para 29.

the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of rights."

Dignity and pluralism

Social and environmental context will always impact on the chosen legal framework. Most legal arguments have accepted that the main important ingredient for regulation is the basis for authority to conceptualise and eventually make law⁷⁵. Law is necessary to regulate relations among human beings and bring harmony. Tritely so, that is why human beings are granted the inherent human dignity right⁷⁶. Hence the need for ubuntu to be promoted whenever there is human interaction with the state. *Ubi societas, ibi ius* is the relevant expression in application of law and establishment of orderly societies. In all human beliefs, there is a start and an end, hence the notion of authority and legitimacy of those who govern, make laws and eventually, constitutional dictates. The Constitution dictates everything that the state can do to its citizen and for them.

Langa CJ, said what is illegitimate is capable of being unlawful and improper⁷⁷, hence the crucial need to ground legitimacy of African traditional leaders and customary governance within a democracy since customary law is recognised as lawful by the Constitution.

According to traditional customs, the forefather of the African tribes creates the identity of Africans. Otherwise as Davidson points out "Outside the ancestrally chartered system there lay no possible life, since 'a man without lineage is a man without citizenship': without identity and therefore without allies. Or a man outside his clan is like a grasshopper which has lost its wings⁷⁸. In any society, human beings cannot leave without other human beings, hence the human dignity principle and meaning of ubuntu, understood within the context of Maine's social compact origin. The human dignity right with its dual functions⁷⁹ become both a crucial entrenched right and a foundational value.

My concern as I read the writings of Holomisa⁸⁰ is the sense that the focus is on respect and recognition space for traditional leadership and not so much about the subjects of the traditional system. There is no reciprocal respect argued that must come vice versa from the leader and its subjects. As I view this, there can be no customary law without the legal community and there can be no traditional leadership that the Constitution dictates must be recognised without the right to adult suffrage and there could be no government without the citizens.

The governed make a leadership in every sector of human life. The necessary harmony amongst people and leadership dictates the existence of a rule of law and ubuntu. A legitimate government exists only if its citizens have played a role in such legitimacy processes and not dictatorship.

⁷⁵ Chanock: Constitutionalism and the 'Customary' early draft

⁷⁶ Dawood and another v Minister of Home Affairs; Shalabi; Thomas and others v Minister of Home Affairs 2000 (8) BCLR 837 (CC) paras 30-31 talking to family, marriage and societal cords at large.

⁷⁷ Bhe judgement explaining in relation to terms that relate to "illegitimate children" and how such terms could connote degrading nature to human beings.

⁷⁸ Davidson: 55

⁷⁹ Cheadle, Davis, Haysom, SA Constitutional Law: BOR, 2002, Butterworths page131

⁸⁰ All articles in According to tradition.

Ubuntu conceptualises democracy. It is breathtaking to see the incorporation of ubuntu/dignity as a prominent constitutional value and entrenched right in the Constitution⁸¹.

Ackerman J informs that, the South African legal system is mixed precisely due to its roots as developed through the Roman-Dutch law and English law as early as 1815⁸². It is apparent that the African leaders attempted to promote and maintain African law and the African legal responses⁸³ whilst they resisted colonisation. The problem arose when emphasis of certain African cultures, like the KZN Zulu Code and others, due to political strengths were turned into "official customary law"⁸⁴ at the disregard of others.

Justice Mokgoro⁸⁵ termed ubuntu as "humaneness", "personhood", and morality. She said:

'While ubuntu envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense denotes humanity and morality.'

Ubuntu as a value incorporates, communality as opposed to individualism, and lobbies for peace keeping. Ubuntu is derived from communalism and associational community. Communalism is a fundamental moral value in African philosophy⁸⁶.

Metz⁸⁷ defines African community as an 'ideal form of social interaction composed of identity and solidarity'. In Bantu traditions, the community provides identity to an individual whilst they live communally in solidarity, hence the Zulus, Xhosas, Ndebeles, Sothos, Tswanas and Vendas. Ubuntu embrace the right to self-determination and many other entrenched communal or cultural rights.

The indigenous value laden justice system continually aspires to reintegrate the offender into society, and restore what seeks to destroy or undermine the stability within the tribal community. The traditional law system is more constructive, corrective and retributive⁸⁸. Customs and tradition kept the tribal society from disintegrating. Traditional justice system restores humanity and respect for one another and human belongings. Colonialism and apartheid distortions of tribal power sought to address black affairs through attempts to maintain power and control blacks using traditional leaders. The abuse of tribal power and greed became the end result of the colonial distortion process. The government of that time, illegitimated a proper effective tribal system and fostered instances where a person's worth and belonging had no credence but the wishes of a king became paramount against all else, even the care for his subjects⁸⁹ got sidelined.

However, even so, what Dalindyebo, King of the AbaThembu (Xhosa) did may mean, he is above the law and the rule of law means nothing to his administration of customary law, the application of section 20(2) of BAA should have brought some relief and avenue to approach

⁸¹ The postamble stated "... a need for understanding, but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not victimisation." Also section 10 of the Constitution.

⁸² Ackermann: 88.

⁸³ Saunders.

⁸⁴ Claassens' thesis and SALRC Project 25: Statute law

⁸⁵ Makwanyane at para 308.

⁸⁶ Davidson:71

⁸⁷ Metz 2010:255

⁸⁸ Maluleka

⁸⁹ Outside apartheid regime see Dalinyebo 2009 criminal cases with charges for the death of Saziso Wofa, abduction of Ncingile Sonteya's children and arson. Consider cases of traditional leadership fighting for proper position in government only for their benefits and clutching the public purse.

law courts. It provides that the jurisdiction of a chief in criminal matters **may not inflict punishment involving death, mutilation, grievous bodily harm or imprisonment.** Ubuntu and legality cannot permit such unlawful and inhumane conduct from any leader exercising state power, which must be the reason eventually he got sentenced to 15 years imprisonment.

In Bantu justice once the criminal or civil debt has been settled that ends the confrontation and a satisfactory restoration process of the displaced tribal balance and humanity begins. Courts today are applying judicial restraint and optimism to find appropriate sentences which corresponds with the crime and circumstances. The incorporation of the customary law system with all its good values can boost the current justice system and eliminate unnecessary discriminations that could be fostered in promoting a legal system that functions outside the one the Constitution envisages.

In October 2013 I attended a workshop in Durban on the relationship between traditional justice and criminal justice systems. The Durban Workshop grounded sentiments that the KwaZulu AbaThembu and AbaChunu Councils felt manipulated, demeaned in their inherent humanity and dignity⁹⁰ by the manner in which traditional leaders have been diminished by government. Contrary to kings who act unlawfully, like King Dalindyebo, the other people in tribal settlements appreciate and praise the work done by their traditional leaders⁹¹.

The discriminatory experience directly felt by the people opting to exercise traditional justice systems is unfair and unjust. The criticism to the TCB illustrates sadness from both the ruled and the rulers⁹². The traditional leaders may have a role but if one looks at the manner in which other traditional leaders⁹³ utilise the system for their benefit instead of looking after the tribe, the concerns against traditional courts seem valid.

Ubuntu as a foundational constitutional value for human dignity is an idea based on deep respect for the humanity of another⁹⁴ to which traditional law and culture considered long ago as the main pillar of this law. Bantu law objectives include restoration of harmonious human and social relations to control and avoid the rapture to community norms⁹⁵. The ubuntu value intrinsically entrenches and validates natural differences with acceptance for diversity thus instils pluralism. Due to the sad South African history, we cannot disregard cultural diversity even if it manifests pluralism.

In 1994 the South Africans voted for a democratic government where each citizen has a voice to influence how South Africa is governed. The 1994 democratic elections brought a single supreme legal system, stipulated as the Constitution. The Constitution and the opted choice of a sovereign democratic state do not permit differentiation based either on birth or

⁹⁰ Justice Mokgoro said discrimination barred by section 9(2) of the Constitution is the one that falls into the grounds that make the person or has the "potential to manipulate, demean a person in his or her inherent humanity and dignity" quoted at para 16 of *Larbi-Odam and Others v Member of the Executive Council Education (North West Province)* 1997 (12) BCLR 1655 (CC) where she quotes with affirmation Harksen at paras 45-49.

⁹¹ The AbaThembu and AbaChunu, KwaZulu, Emsinga.

⁹² Inkosi Phathekile Holomisa, MP, SA Crime Quarterly No 35, March 2011, *Balancing Law and Tradition: TCB and its relation to African Systems of Justice Administration*, page 17-22.

⁹³ The December 2009 Buyelekhaya Dalindyebo criminal case, discussed by Sindiso Mnisi Weeks, *The Traditional Courts Bill: Controversy around process, substance and implications*, at page 3-10 and the public submissions about tribal fees imposed on the people.

⁹⁴ Makwanyane at para 263.

⁹⁵ *Dikoko v Mokhatla* at para 68, 114

the constitutional space to recognise traditional leaders. The constitutional legal system creates room for the recognition of customary law without providing for it to be a separate⁹⁶ stand alone legal system. The Constitution requires a governance and justice system that recognises the existence and application of customary law just like any other law.

The Constitution does not create a dual mandate with many legal central systems. There is one legal system which has subsumed into one all other legal systems⁹⁷. Constitutionally speaking then, only elected legislatures have the authority to determine legal norms to be followed in this country⁹⁸. Section 43 of the Constitution grants a monopolised legislative authority to elected legislatures only. It is clear that in terms of the Constitution only elected legislatures and courts are empowered to determine and interpret legal systems respectively. It is the elected as they are conferred with the constitutional legislative authority. What I conclude from this constitutional imperative is that traditional leaders have been stripped the power to determine customs likely to result in customary law. Section 211(2) of the Constitution further provides that a traditional authority which **observes a system of customary law** may function subject to the Constitution and applicable legislation and customs. 211(3) provide that courts must apply customary law whenever it is applicable but subject to the Constitution and specific relevant legislation. With reference to these provisions and the stipulation of the Constitution that customary law may be developed by courts such provision clearly takes away the law making process of customary law and only permits its development. I accept, the application of both the common law, as our adopted existing western law, and the customary law create pluralism.

Pluralism cannot be avoided, especially because the Constitution, as our supreme law, has validated and enabled it. All that is expected of the constitutional administration implementing a customary law system is the consistent compliance with the Constitution. The Constitutional Court⁹⁹ has given one interpretation that government obligation that require rationalisation of traditional court systems consistently with the Constitution as dictated in terms of section 166(e) and Schedule 6 item 16 of the Constitution.

The recognition of customary law and rationalisation of legislation dealing with traditional courts does not mean the same thing. Recognition and application of customary law creates pluralism but the Constitution does not create traditional courts, although these courts' legislation can be rationalised. Alternatively traditional courts, as courts of law may be established in terms of section 166(e) of the Constitution. If continued existence of traditional courts is determined through invoking section 166(e) of the Constitution, surely they will form part of the judicial system and must therefore comply fully with every requirement of chapter 8 of the Constitution. In my view traditional courts should be placed outside section 166(e) and rather be regulated as administrative bodies in terms of section 34 of the Constitution.

The Labour Appeal Court in *Kievi's Kroon Country Estate (Pty) Ltd v Mmoledi* (2012) 33 ILJ 2812 (LAC) (Mmoledi) confirmed the importance to recognise diverse cultures which promote legal pluralism. Mmoledi has been dubbed the clash of the cultures judgment. The brief summary of the case informs us that Mmoledi was employed following the western employment laws and was faced with a cultural customary law belief whilst employed. The parties were required to apply both systems in an attempt to find a solution. The court

⁹⁶ Section 211 of the Constitution and para 195 of the 1996 Certification judgment.

⁹⁷ Bhe paras 43-44 and 33 of Pharmaceutical.

⁹⁸ Sections 43, 44 and 39(2) Constitution.

⁹⁹ Para 199-200 Certification judgment 1996

assisted the employer who was set on following the western standards and the employee Mmoledi who strongly believed and had unshakeable convictions on the customary standards. The court showed them an application of both systems which resulted in an amicable win-win solution.

Hence I want to show that through this case a constitutional legal system recognising all cultures and demanding lawful respect and equal application for each one of them is possible despite the resultant legal pluralism. The Constitution entrenched constitutional legal pluralism by enabling the recognition of customary law¹⁰⁰. Here the court was seized with having to decide which culture must prevail between the western medical culture and the customary herbal culture. Both the Labour Court and the Labour Appeal court actually found that the constitutional recognised customary law must exist alongside the adopted western law. Both western standards and the African culture standards are protected and must be promoted through a constitutional application. This case is a good example of legal pluralism.

It basically illustrate that with the employment environment there is nothing more that can be done than to accept diversity tolerate each others' culture. Both western and customary standards were recognised and applied equally to resolve customary/labour based dispute. Our labour law is mostly international (European) or common law based whilst the applicable customary law and beliefs here are obviously customary. Mmoledi illustrate a point of distinction between customary law recognition and operation of traditional lifestyles and the courts taking that proper recognition and applying customary law in terms of section 211"(3) of the Constitution. I support application of customary law in a proper manner by the courts of law but am ambivalent towards the continued existence of traditional courts outside the judicial system.

The Judge at para 26 of Mmoledi said:

'It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe in them and regard them as part of their lives. Those who do not subscribe to the others' cultural beliefs should not trivialise them ...'

My emphatic point, which is instructive, the court said:

'A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but "botho" or "Ubuntu" which is part of our heritage as a society.'

This judgment illustrates how constitutional based legal pluralism complements any dual legal system.

¹⁰⁰ Chapter 12 of Constitution

Chanock¹⁰¹ argues that in fact our different cultures eventually become the law once the powerful one is victorious and assumes the power to rule. In other words Chanock asks: who can argue that common law is not the western culture and customary law is not the African culture incorporated as law. The ruling party being predominantly black can actually promote proper recognition and application of customary law as did the apartheid government when it entrenched the common law.

The Traditional Justice Draft Policy¹⁰² captures the two systems complementing and supporting one another. The main complimentary purpose of the traditional justice system is to increase access to justice for social groups which may not be adequately served through the formal western judicial system. The Constitution envisages a traditional justice system that does not substitute the formal (western) justice system. I am in agreement with that constitutional position because such incorporative constitutional pluralistic system illustrate that traditional people possess a proven ability to find own solutions to their peculiar challenges and can innovatively come up with mechanisms that are African but still effective¹⁰³ and sufficiently justified to become nationally recognised law.

The people in the tribal authorities cannot further continue to be “foreign natives” even in the democratically elected South Africa. That is wrong and continues to perpetuate the wrongs of apartheid and colonialism.

Primarily for customary law, the object for Bantu traditional law systems is to preserve the tribal composure¹⁰⁴. Traditional law maintained the social fabric prior to colonisation and apartheid; it still has the ability to do so in our days. However, today, as expected, with the Constitution entrenching the rule of law, underpinning democratic values of ubuntu, human dignity, adult suffrage and equality¹⁰⁵, there is no need for subordinate legal system or unfair outsourcing of administering justice.

Meaningful engagement and democracy

The meaningful engagement principle within legislative process of traditional courts and the public participation right in a democracy entrenches a rational and legitimate government purpose to any government action. The legislative process participation and direct involvement of the people affected enable opportunity to shape the resultant Act and forebears easy obedience to the law if citizens form part of its making. Appropriate deliberation coupled with constructive meaningful engagement may elicit useful information and produce better acceptable outcomes¹⁰⁶.

Section 195(e) of the Constitution enjoins public administration to respond to people's needs and the entire state to encourage public participation in policy-making. This injunction gives

¹⁰¹ Martin Chanock, culture and human rights: orientalisng, Occidentalising and authenticity, Mamdani (Ed), Beyond Rights Talk and Culture Talk, 2000 and his early draft paper on constitutionalism and the customary.

¹⁰² Point 6.1.2 at page 30 affirms that traditional justice system is not to substitute the formal judicial system but must complement and support the judicial system. It further says this system seek to increase access to justice for social groups that are not adequately or fairly served by the formal judicial system.

¹⁰³ Salvatore Mancuso, An African Concept of Settlement of Disputes, page 43 -55, Celebrating African Culture, Human Rights and Modern Constitutions, T Nhlapho, E Arogundade and H Garuba (Eds) UCT 2013.

¹⁰⁴ Soga, fn 15.

¹⁰⁵ CP IV read with section 2 of the Constitution.

¹⁰⁶ Sandy Liebenberg, Socio-economic rights adjudication under a transformative constitution, pages 30- 33 and Stu Woolman

effect to the will of the people. It is against representative, participatory and deliberative democracy for a democratic representative government to decide to develop its policy and law on the traditional courts without letting people¹⁰⁷ inform government or for government's failure to incorporate the lived customary law through utilising correct informative public participation¹⁰⁸. Participatory democracy provides citizens with a meaningful opportunity to be heard¹⁰⁹.

Public participation dictates that persons affected by a state decision must be consulted and provided with fair opportunities to influence government conduct¹¹⁰. The constitutional recognition of traditional courts or rationalisation of indigenous justice system legislation must be done democratically¹¹¹ in order to alleviate the distortion created between official and living customary law¹¹².

Out-cry of people from traditional settlements who are willingly self-governed by customary law illustrates either the lack of meaningful consultation by the government or failure to have considered people's views from the consultative participation previously done¹¹³. Meaningful engagement with the people should have resulted in a dialogue where people's views are seen to impact on or influence the end result. The outcries illustrate limited form of participation which clearly was available only to the senior traditional leaders consulted through the NHTL or the elite with access to information and knowledge as to what transpires within government legislative processes.

Evidence shows that information on traditional courts' legislation rationalisation was seriously lacking to the people in traditional settlements. Democracy is generally termed as government by the people but I conclude that there was no democratic principles application in rationalising legislation on traditional courts¹¹⁴. This conclusion means that at the policy making stage people were not consulted but only traditional authorities, perhaps made representations, if at all, without considering the views of its people. The democracy principle of and right to public participation entails societal participation, consultation, consensus and transparency.

It is a fact that in many traditional settlements women have never participated in decision making structures¹¹⁵ since they were taken as perpetual minor dependants. However women lobby groups in the past 20 years have made strides to achieve women representation in decision making structures of traditional leadership. The TCB may trample all that hard work.

¹⁰⁷ Mnisi Weeks, at page 5 of fn 3

¹⁰⁸ Nomfundo Gobodo, Overview and shortcomings of TCB: Balancing Law and Tradition: The Regulation of traditional justice in SA, ISS Seminar facilitated by Crime and Justice Programme of ISS and the Law, Race and Gender Research Unit of UCT.

¹⁰⁹ Mrafong Dermacation Forum and others v President of RSA 2008 (5) SA 171 CC para 27 and Doctors for life paras 129-135

¹¹⁰ Doctors for life v Speaker of NA 2006 (12) BCLR 1399 (CC) (Doctors for life)

¹¹¹ See para 114 Bhe where court noted that already in 2003, the Minister had good intentions for broad consultation, but it does not become clear whether such constructive dialogue has truly happened.

¹¹² Ngcobo J at Bhe para 151 quotes Benet defining customary law with three different meanings due to the political influences of the time. The official body of law employed in courts and by the administration due to what was codified which was completely diverging from actual social practice. The law used by academics and the proper "living customary law" which was actually lived by the people.

¹¹³ Aninka Claassens, Who told them we want this Bill? The Traditional Courts Bill and rural women

¹¹⁴ Most of Aninka Claassens's, Sindiso Mnisi Weeks' and Nomboniso Gasa's published work

¹¹⁵ Annual Survey of South African Law, 2003 page 9

Recursion¹¹⁶ must happen in order for the traditional system once known and developed to remain in sync with the Constitution. It is not rationalisation of traditional courts' legislation which selectively considers the views of traditional authorities and not of the people affected that is required. Given that through time, customs and environments evolve, the traditional people do¹¹⁷ and must be allowed to evolve beyond the unconstitutional customs but do so with ongoing state assistance and protection.

As argued by the Centre for Law and Society, there could be many pathways to justice¹¹⁸. Just as naturally the walking pathway becomes redirected when it is necessary, the cultural pathways of justice can also change the unconstitutional cultures or abrogate them by disuse. In fact, historical cultural practices that are still accepted custom illustrate constitutional compliant occurrences taking place. For example the Durban Workshop taught me that people are no longer banished as a punishment in compliance with the Constitution. The primogeniture rule has been revised for consistency with the Constitution. Without direct people engagement, government would not know that people are evolving with times.

Separation of powers within legislative making process

A democratic state consists of three government branches, where each has specific crucial roles to sustain democracy. A state is concerned with law and order. CP VI dictated separation of powers between the legislature, executive and judiciary with appropriate checks and balances. Constitutionally speaking these are the three branches of government, the *trias politica*. The separation of powers principle fosters accountability, responsiveness and openness to the governed by the governors. Separation of powers sets boundaries necessary as fundamental checks and balances within government structures and spheres. It demands that each government branch or sphere must refrain from undue interference in another's autonomous powers and proceedings¹¹⁹.

The entrenched separated structures divide government components, precisely to maintain clear boundaries between the powers of the government spheres (local, provincial and national governments), legislature¹²⁰, judiciary¹²¹ and the executive. In creating the government structure, the Constitution did not exclude traditional authority from what constitutes government. Traditional leadership is given a role in the local government and has the obligation to influence legislation pertaining to customary law or customs.

Parliament is the principal legislative body¹²² with authority to make national laws. The executive¹²³ is entrusted with the duty to develop and implement public policy and

¹¹⁶ Anthony D' Amato, International Law as a unitary system, Routledge Handbook of International Law, David Armstrong (ed) at page 105 where recursion means the act or process of returning to the application of a function of its own values.

¹¹⁷ Para 81 Bhe

¹¹⁸ Dee Smythe and Diane Jefthas, Pathways to Justice, Centre for Law and Society (2013)

¹¹⁹ Chapter 3: Constitution.

¹²⁰ With the duty to pass legislation that is reasonably clear, precise to enable citizens to understand what is expected of them: Hyundai 2000 (10) BCLR 1079, para 24

¹²¹ Interpret legislation in conformity with the Constitution, *ibid*.

¹²² Vested with the power to make, amend and repeal law in terms of sections 43 and 44 of the Constitution, also see Rautenbach and Malherbe, Constitutional Law Revised Second Edition, Butterworths, 1997 at page 69.

¹²³ The executive authority has the power to execute and enforce law vested in terms of section 85: see fn 110 *ibid*.

constitutional legislation. The judiciary¹²⁴ must settle disputes amongst the branches of government and individuals and interpret all laws.

The Constitution's design left certain matters to different branches of government in order to ground the needed rubric that can hold democracy together. The purpose here was to avoid centrally concentrating power into one government branch. All government branches together with traditional authorities as public structures need to observe and respect the prescribed constitutional limits and separation of powers doctrine. The doctrine read with the rule of law requires that each government branch must have clear statutory enable and limited powers and duties. The Constitution further provides the checks and balances that ensure public power is not too centralised to the point detrimental to those governed.

Prior to enactment of the Constitution, customary law permitted traditional leaders and traditional councils to perform all administrative functions centrally amongst traditional leadership without clear cognisance to separate state functions and duties¹²⁵. The traditional communities, together with the traditional authority, in the past, created customs or indigenous laws¹²⁶ which were followed within a particular tribal settlement and therefore according to custom still possess the authority to alter those customs in line with the current circumstances¹²⁷. The traditional leaders¹²⁸ as custodians of traditional law and custom cannot in the democracy state be legislatures, the judiciary and executive altogether. However, I argue that traditional leaders can be policy makers through facilitating the evolvement of customs and somehow adjudicate when hearing the indigenous law disputes as an alternative dispute resolving mechanism.

The method envisaged for traditional courts operating through customary justice system by the TCB is against the principle to separate the state powers. I make this finding on the basis of the proposed traditional courts system where the senior traditional leadership can be the three branch government structure in one whilst creating confusion with the existing democratic state design. However, the same failure to separate the executive and legislative powers at local government is not precluded by the Constitution.

A place for traditional authorities is located by the Constitution at local government level¹²⁹. Traditional leadership has never been democratically elected, however their authority cannot by the stroke of the pen be removed¹³⁰ due the chapter 12 of the Constitution recognition for the institution, status and role of traditional leadership. Other than developing existing customs to be consistent with the Constitution no traditional leader is empowered to further legislate on customary law¹³¹.

The constitutionally empowered determination of local government boundaries required consideration of the traditional authorities' boundaries and legitimacy. National and provincial governments were enjoined to promote partnerships between local municipalities and traditional councils through legislative or other measures. Section 81 of the Local

¹²⁴ Judicial authority is the power, in disputes, to determine what the law is and how it should be applied in concrete situations in terms of section 165: fn 110.

¹²⁵ Bennett: 127.

¹²⁶ Paras 45 and 86 in Bhe

¹²⁷ Shilubani para 27

¹²⁸ Bennett: 111 inform that there 800 chiefs supported by 13 000 headmen and traditional councils.

Point 6.1.7 at page 30 of the Traditional Justice Draft Policy

¹²⁹ Section 212(1): Constitution.

¹³⁰ ANC and another v Minister of Local Govt and Housing, KZN 1998 (4) BCLR 399 (CC) at para 18

¹³¹ Sections 211 and 43: Constitution and paras 42 and 43 of Shilubani.

Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), (Municipal Structures Act) provides a flexible manner under which traditional leaders should participate in local government structures and matters that affect traditional communities, however these are not given practical credence.

Section 5 of TLGFA enabling the creation of partnerships between district and local municipalities and traditional authorities within traditional communities read with section 81 of the Municipal Structures Act seem to window dress the statute book. These provisions should be phrased differently not as a voluntary partnership. The envisaged partnership must not be a choice but an expressed obligation upon government to recognise traditional authorities in terms of chapter 12 of the Constitution. The current challenges clearly bind one to conclude that little or no consideration of the traditional authorities' boundaries, jurisdiction and legitimacy was considered to enable appropriate inclusion of these structures within the constitutional envisaged government or the failure lies in properly implementing chapter 12 of the Constitution.

Based on views derived at the Durban Workshop municipal councils face challenges to incorporate or work in partnership with the traditional councils¹³², where both should enjoy equal lawful recognition and status. Govan Mbeki argued that maintaining the traditional leadership as part of government is promoting enslavement on the rural people and not affording the liberation fought for¹³³. There is an ambivalent sentiment in this statement, which promotes the western dictated legal system without a chance to indigenous systems and illustrate ambivalent stance noted by Ntsebeza of the confusing ANC led government in traditional courts' policies.

As in AbaThembu and AbaChunu traditional authorities from Kaw-Zulu Natal, most other traditional councils¹³⁴ share sentiments that historical powers and duties of traditional leaders have been curtailed by government. It is a fact, government structures are not willing to work with the traditional authorities¹³⁵ instead evidence portrays state officials feeling threatened and volatile towards the traditional authority structures. An example is that mentioned by some participants at the Durban Workshop that the state prosecutors or magistrates' court clerks in Umsinga areas have refused to even keep the register of cases handled by traditional leaders or offer relevant assistance. Rugege argues a need for a model of cooperative governance in rural areas which conforms to the Constitution, I advocate for the same.

Historically the governing of the tribe was the responsibility of the tribal leader together with the recognised tribal councils, whilst the BAA delegated the social and political affairs of the tribal community to the recognised political units. Many duties for traditional leaders have been seriously diminished or become obsolete. I believe the decrease in these powers was necessary in order to allow democracy to prosper.

¹³² Ntsebeza: 257.

¹³³ Page 259 Ntsebeza quoting from Govan Mbeki's 1984, South Africa: The peasants' revolt and whole of Chapter 8.

¹³⁴ In terms of the written reply to the National Council of Provinces to question number 320 from Mrs EC Lingen (DA- Eastern Cape) from the Minister for Cooperative Governance and Traditional Affairs as to how many tribal authorities are in each province, the answer reveals that Gauteng: 2 traditional councils (TC), Northern Cape: 8 TC and one community authority, Mpumalanga: 61 TC, Limpopo :184 TC, Kwa-Zulu Natal: 301 TC, Free State: 12 recognised TC, Eastern Cape: 240 TC AND North West: 56 TCs. Western Cape does not have traditional Councils.

¹³⁵ Sam Rugege, Traditional leadership and its future role in local governance, Law, Democracy and Development at page 179

Barker¹³⁶ provides a nice outline how the tribal courts functioned before distortion. Barker says a tribal court is a court where the chief acts as a judge and is the only person who passes judgment. The adult males assist the chief to execute the courts' duties. Any adult male may participate in the traditional lawsuit. Tribal courts have the power to reprimand its inhabitants. Headmen courts are required to attempt to settle the disputes before they reach the tribal court. The procedure enabled both criminal and civil cases emanating from similar facts to be conducted simultaneously. The criminal cases seek to reconcile the victim and the offender. The sentenced offender is sentenced to punishment and payment of compensation. There was no legal representation and women participation unless; women were litigants or bringing food to the men in court. Trial was public to men only as they were allowed full participation in the proceedings.

Considering Soga and Mostert, Devenish argues as a matter of fact that traditional chiefs were held accountable and were subjected to checks and balances on the powers they exercised¹³⁷. He notes the "amaphakathi", the chief's traditional council, constituted the Chief's Parliament as well as the Supreme Court. This composition blurred the principle of separation of powers but that cannot be the basis to hinder the recognition of traditional authorities administering customary justice as administrative justice rather than court justice. As trite, there is no absolute separation of powers¹³⁸ and the Constitution does not explicitly demand a strained observance of this principle.

Having noted the lack of absoluteness in the principle of separation of powers and considering the following from Judge Cameron¹³⁹:

"...While Parliament itself may not be called upon to explain its enactments, the executive, which initiates the great bulk of legislation enacted by Parliament and is charged with enforcing statutes is obliged to tender adequate justification for purposes of a limitations analysis."

The statement substantiates the notion of no absolute separation of powers. Our traditional courts, if they are courts of law, may be unconstitutional on the basis of failure to observe separation of powers as well as on irrational discrimination that certain cultures shall be elevated over others. Furthermore, since customary law is mostly applicable only to blacks, such conduct is tantamount to discrimination on grounds¹⁴⁰ like race, culture, ethnicity, social origin or colour. Section 9(3) prohibits the state from discriminating on the basis of the grounds listed.

The disregarded separation of powers principle in the proposed TCB is problematic. The limitation test demands that every organ of state must remain within its mandate whilst restrictive interference into the work of the other in promotion of the checks and balances bolsters the separation of powers principle. TCB fails to achieve that.

Other than mentioning that both TCB legislative processes complied procedurally with the Constitution, the law making process is not necessary to outline. To finalise the understanding, perhaps I must mention that the TCB was published in order to call for public views before it was introduced to the National Assembly in 2008. The parliamentary

¹³⁶ Barker P, *Tribes to Township*, Britain: Panther Books, 1974.

¹³⁷ GE Devenish, *The South African Constitution*, Lexis Nexis Butterworths, 2005 and Bhe.

¹³⁸ Para 108 Certification judgment.

¹³⁹ Centre for Child Law at para 50.

¹⁴⁰ Section 9(3) of the Constitution

processes enabled public participation through holding public hearings in Parliament and through the National Council of Provinces processes. Parliament's committees considered the content and the proposed regulatory framework that seek to establish traditional courts in terms of the Constitution. Even though there were extensive parliamentary processes running for at least five years, nothing has come out of that process. There is no productive end result either the proper rationalisation of old order legislation providing criminal and civil jurisdiction to traditional courts or their establishment as actual courts of law in terms of section 166(e).

Chapter 3

Implicated rights

I appreciate that no right is absolute because section 36 of the Constitution mandates the lawful restriction of any right. The injunction within section 36(2)¹⁴¹, with regards to the promulgation of the TCB, must be adhered by ensuring that no entrenched rights are violated. This chapter outlines rights implicated through the rationalisation of legislation on or continued lawful existence of traditional courts.

Cultural and social rights

South Africans are diverse¹⁴². However for a co-existential human race, it is acknowledged that the Constitution embrace diversity. As a society we must stand united regardless of social appearance differences in order to build a strong sustainable social fabric. As Firoz Cachalia¹⁴³ observes the political liberation struggle in South Africa is the same as the struggle for consolidating a single nation that embraces cultural diversity in linguistic or religious communities, we need to accept each other's diversity. That way we can work through all biggest current challenges facing the country.

This topic is about indigenous or aboriginal South Africans. It is thus interesting to note on behalf of aboriginal Africans that international law has recognised cultural and social diversity. Articles 15(2), 18 and 19 of the United Nations Declaration on Rights of Indigenous People (UNDRIP) provides interesting obligations on member states who have ratified this international instrument. Article 15(2) obliges member states to take effective measures, in consultation and cooperation with indigenous peoples concerned, so as to avoid prejudicing them.

Article 18 provides that indigenous people have the right to participate in decision-making in matters that affect their rights, through their chosen representatives and in accordance with their own procedures. Article 19 enjoins states to consult and cooperate in good faith with the indigenous people concerned through their own representative institutions in order to obtain their free, prior informed consent before adopting and implementing legislative or administrative measures that may affect them. The equivalent of these rights in our Constitution or legislative measures taken by South Africa, as a member state would be enacting sections 30, 31 read with 195(e) and 235 of the Constitution. The Constitution and international law are strong authorities to hold member states accountable and the citizens living in tribal settlements can utilise these two authorities to claim and enforce their rights that are clearly violated when the country promotes and unconstitutional legal pluralism.

Furthermore the right to facilitate public involvement by government is readily extended to and inclusive of indigenous people as depicted in the UNDRIP. Government is obliged to facilitate public involvement and provide measures that protect indigenous people. It follows

¹⁴¹ Section 36(2) tells us that no law may limit any right entrenched in the Bill of Rights except if such law meets the requirements of section 36(1) or any other provision of the Constitution dictates the lawful limitation.

¹⁴² *Daniels v Campbell No and Others* 2004 (5) SA 331 (CC); 2002 (7) BCLR 735 (CC) and *Home Affairs v Fourie* CCT 60/04 at para 108 and 109.

¹⁴³ *Citizenship, Muslim family law and a future South African Constitution: a preliminary enquiry*, Tydskrif vir hedendaagse Romeins-Hollandse Reg, 1993

that Parliament¹⁴⁴ must satisfy the obligations set out in sections 59(1)(a) and 72(1)(a) of the Constitution and UNDRIP related provisions in order to facilitate public involvement relating to people in traditional settlements. PAJA and section 153(b) read with 195(e) of the Constitution requires government to allow participation and represent people accordingly in national and provincial development programmes. These provisions do not stipulate that only traditional leaders as representatives of indigenous people must be consulted but includes all, traditional people and leadership to receive and afforded appropriate consultation.

Right to participation¹⁴⁵ incorporate citizens' meaningful engagement and more importantly a significant specific dialogue with those who are directly affected. In addition to the obligations imposed on the state to facilitate public involvement, section 32 of the Constitution, the right to access information held by the state grants a further right to participate in state affairs that could be utilised by indigenous people. Indigenous people must be provided with means and resources to influence government on what impacts on them. For the most probable fact that the National Houses and provincial houses of traditional leaders are constituted by the senior traditional leaders and consultation was limited to these houses a conclusion that the focus of the TCB consultation focused only on leadership structures and not on the traditionally governed is justified

Section 30 of the Constitution grants "everyone" the right to participate in the cultural life of **their choice** which must be exercised consistently with the BOR. Section 31 provides a voluntary associational cultural right to enjoy ones culture and to form, join and maintain cultural associations. These sections provide for a personal choice election. The cultural association of indigenous people must not be used as an imposition to find traditional courts' legitimacy. Since rights in sections 30 and 31 of the Constitution are optional rights dependent on their existence without infringing other rights, this substantiates the claim for expressed opt in or opt out options into the system of traditional courts. Clause 9(4)(b) of the TCB violates these sections and the principle of opt in or opt out, instead empowers this non-court body to be a court and decide for the parties.

As found in *S v Lawrence*¹⁴⁶, the right to culture must be free from state coercion and any traditional law legislative framework must recognise that requirement.

Personality rights

Section 235 of the Constitution manifest the right to self-determination and make provision for a collective or individuals' determination of those sharing commonality. Article 3 of the UNDRIP provide a right to self-determination to indigenous people. Article 8(1) provides further that indigenous people and individuals have the right not to be subjected to forced assimilation or integration or destruction of their culture. These provisions are crucial legal instruments enabling a claim for indigenous people to demand their autonomy, self-determination and choice to be governed through customary systems and for the individual

¹⁴⁴ SA has a bicameral Parliament with two equally important Houses, namely the NCOP and the National Assembly (NA).

¹⁴⁵ Geo Quinot, Snapshots or participatory democracy? Political engagement as fundamental human right (2009) 25 SAJHR

¹⁴⁶ *S v Nagel, S v Sollberg* 1997 (10) BCLR 1348 (CC)

state to provide effective mechanism¹⁴⁷ to maintain and protect the integrity of indigenous systems.

There is no eloquent way to state the importance of self-determination for any human being other than acknowledging that as human beings we all have dignity hence section 10 of our Constitution. The human dignity as Metz explains "demand of all human race, in order to become a human being worth of sharing the world space with others", to treat each equally and with respect.

African indigenous system application need not create a dual system which is contrary to the supreme constitutional order. However, as the Constitution does, a traditional justice system should enable self-determined preference and require government to provide protection and mechanisms to create an enabling environment for people to collectively or individually determine who they are. Sections 30, 31, 235 read with the preamble of the Constitution realises the diversity in our cultures and illustrate that despite diverseness we are still capable to respect one another and live in harmony regardless the differences. These sections further appreciates that cultural personal rights can co-exist with other rights as long as the BOR is the threshold and benchmarking instrument in the enforcement and enjoyment of these rights.

The right to self-determination cannot easily be detached from the right to participate in the cultural life of one's choice¹⁴⁸. Section 31 of the Constitution dictates that persons belonging to a cultural community **may not** be denied the right to enjoy their culture, practise and use their cultures and to form and maintain cultural associations. These are powerful rights granted to persons in association. It is clear that cultural rights cannot be customised to one individual citizen but is a right to associated and collective citizens. Even though the collective right to culture is consciously subordinated to other entrenched rights¹⁴⁹, it is good that such rights are entrenched and granted to all minority and majority people. The right to culture and protection thereof is a right that the indigenous rural people can claim and demand from the state in line with section 7(2)¹⁵⁰ of the Constitution. The TCB is drafted contrary to the living customary law as well as imposed and not optional to indigenous Africans living in tribal settlements.

Political rights

The Constitution makers believed that to seek to deal sufficiently with the suffering and pains experienced in past South Africa, moving forward all citizens must be, treated and viewed equally despite race or colour¹⁵¹. In terms of section 3(1) of the Constitution South Africans share a common South African citizenship. Section 3(2) of the Constitution embodies social roles where all citizens are equally entitled to the rights, privileges and benefits of citizenship and subject to the duties and responsibilities of citizenship. The rights and responsibilities entrenched in the Constitution are equally bestowed to rural indigenous people in the same way as for people in urban areas.

¹⁴⁷ Articles 2, 3, 4, 7(2), 8 and 9 of the UNDRIP.

¹⁴⁸ Section 30 and 31 of the Constitution bears authority. These two rights have a double built in limitation adumbrated in section 7(3) of the Constitution.

¹⁴⁹ Devenish: 157.

¹⁵⁰ The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

¹⁵¹ The preamble postulates as follows:

...people of South Africa believe that South Africa belongs to all who live in it, united in our diversity. ...

Section 19(2) provides a political right to hold regular elections to choose a legislative body. The fact that traditional communities or communities observing customary law are unable to vote for their traditional authorities goes against political equality¹⁵² in the same way as it is against the hereditary traditional custom if appointment must be done in terms of public elections. Amazingly objectors against the inclusion of traditional authorities as part of government structure argue the lack of democratic election and legitimacy for traditional authorities. The traditional authority can come into power through a democratic election especially where the community is not satisfied with the hereditary chief or where one is non-existent¹⁵³.

Section 19(2) of the Constitution accords every citizen with the right to free, fair and regular elections for any legislative body established in terms of the Constitution. But traditional leadership is already recognised by chapter 12 of the Constitution. In other words customary law need not be enacted by an elected legislative body but must be developed by courts. Furthermore, the traditional leaders are not a legislative body elected in terms of the Constitution in the first place therefore a requirement for section 19(2) lacks further applicability since their establishment existed before the Constitution came to life. However, conclusively, in terms of the Constitution traditional leaders are prohibited from creating new customary law. Hence section 19(2) of the Constitution does not find substance and applicability in this regard because there is no longer a need to enact customary law and therefore there is no need for elections of traditional law legislatures.

Charmaine French argued that section 2(1)(a)(ii) of the Black Authorities Act, 1951 established community authorities including tribal communities thus that provision is the lawful enactment that created a fictitious legitimacy on hereditary chieftain-ship¹⁵⁴. It is important to capture that today there are still contestations on the legitimacy¹⁵⁵ of many chiefs despite numerous state interventions. CP XVII permitted deviation from the democratic representation in relation to the preservation of traditional government¹⁵⁶. The deviation is to the effect that traditional leadership is constitutionally recognised without having to undergo the democratic representative elective process but the customary law is also recognised as was and can only be developed by the courts. However, the deviation provided by this principle does not mandate an injury to democracy and a blanket disregard of the political rights and does not create the forth level of government¹⁵⁷.

Where hereditary chieftaincy is legitimate the traditional rural people do not see the manifest of the right to choose their own leaders and representatives in the sense envisaged by section 19, which right the Constitution grants to all South Africans¹⁵⁸. I do not see any other justifiable reason to limit political rights in section 19 for the rural people, except the deviation provided by constitutional principle XVII read together with XIII. In giving credence to

¹⁵² Theunis Roux in Stuart Woolman, Theunis Roux, Michael Bishop, Constitutional Law of South Africa (Student Edition), 2007, Juta. I concur with Dworkin's approach that democracy vest claimable and protected rights. Indigenous people as human beings with recognised rights also equally have and can claim all other rights that are entrenched in the Constitution. So as the three argue at page 10, the Bill of rights does not detract from democracy but the rights themselves are constitutive of a democracy.

¹⁵³ Charmaine French:22 and TLGFA.

¹⁵⁴ Charmaine French, Functions and powers of traditional leaders, Konrad-Adenauer-Stiftung, Occasional Papers Series, September 1994.

¹⁵⁵ Bennet: 120-21.

¹⁵⁶ Bennett's term.

¹⁵⁷ ANC v Min of Local Govt KZN 1998(4) BCLR 399 (CC) paras 18-19

¹⁵⁸ Ntsebeza: 16.

traditional courts which are not administrative bodies is an unconstitutional interference by the state because instead of altering the old order legislation dictates the state is outsourcing the proper administration of justice by courts to traditional courts.

There is lack of peoples' will in traditional communities if the hereditary inheritance determines the next king, induna, chief that is to become the judiciary and the law maker in the context where new customs may still be created by the traditional leadership. If the development of customary law is left to the judges in a court of law whilst the traditional leadership preside as judicial officers in a traditional court that is still unconstitutional. It is unconstitutional because there is no provision in the constitution that enables traditional leadership to be part of the judicial system as envisaged in chapter 8 of the Constitution.

Section 29 of the KwaZulu-Natal Traditional Leadership and Governance Act¹⁵⁹ provides that the Iziphakanyiswa can be elected through normal electoral procedures as opposed to the hereditary succession. The members of the KwaZulu-Natal Provincial House of Traditional Leaders are also elected¹⁶⁰ in line with section 49(2) of the KZN Constitution, through elections. If the law can properly recognise traditional communities, traditional leadership and promote application of customary law, that same law and government structures can also put the infrastructure in place to ensure that such traditional communities are enabled to enjoy all rights in the BOR, including cultural, political and justice rights.

Just as in contrast, section 19(1) of the Constitution grants every citizen a free political choice to participate and to form a political party, traditional leadership should not be denied political rights. Government policy¹⁶¹ envisions a situation where the traditional leader who takes up a political office, in law may, have to relinquish for the time being the traditional leadership role where such person takes a political appointment. The post of traditional leadership is expected to be filled by someone else in an acting capacity. That is unconstitutional since it is unjustified limitation of political rights. I think since traditional leaders and office bearers are paid by government, instead there should be a restriction that the incumbent may not get remunerated for both positions. The restriction should not be to the right but payment in terms of section 219(1)(a) of the Constitution in relation to remuneration of traditional leaders and political office bearers.

Equality

Section 9(1) of the Constitution entrenches a right to everyone to be equal before the law, gain equal protection and benefit of law. Section 9 of the Constitution goes further than prohibiting differences on individual or group basis but it also deal with differences in social arrangements. Hence equality concerns become a comparative exercise a comparison that the other is far off better compared to the other. This means traditional law is law in the country which the Constitution recognises comparatively to common law or other legislation (statutory law).

The recognition of traditional South African societies except, for the Lobedu people, who already recognise women traditional leadership, must be changed to accommodate both

¹⁵⁹ Act No. 5 of 2005

¹⁶⁰ See section 33 of Act 5 of 2005.

¹⁶¹ The 2002 Draft white Paper on Traditional Leadership and Governance at page 30, 3.4. The traditional leadership institutions as public entities should be non-partisan though.

women and men equally as section 9(1) of the Constitution dictates. In some provinces¹⁶² this has been shown to be practical. It is possible to change patriarchal systems or other traditional discriminatory ways through legal measures.

The Constitution ushered a new democratic order and sought to achieve a society where all can be accorded equal dignity, respect¹⁶³ within society despite the beliefs they share. The government's failure to accord the other justice systems the same recognition and respect as the western justice system amounts to the unfair discrimination prohibited by section 9(2) of the Constitution. Such state conduct treats people differently in a manner that impairs on fundamental dignity as human beings¹⁶⁴ solely based on the different attributes and characteristics that the discriminatory treated shares. However, such discrimination ignores the crucial factor that all humans are equal and share an inherently equal dignity regardless whether they choose to follow western, Muslim or African lifestyles. What the state is doing by giving little or no respect to customary law and the people keen to live traditional lives is to breach section 9(2) of the Constitution and the social dictates of African people.

Chapter 12 recognises traditional authority. In *Pilane v Pilane*¹⁶⁵, the court brought certainty that the Constitution does not preclude either recognised or unrecognised traditional leadership when speaking of traditional authority. In other words the recognition by the state does not make a known and recognised traditional leader by its community an invalid traditional leader. That is the lesson amongst others from *Pilane*. The traditional authority can stem from birthright or through any other manner that a traditional community find legitimate.

Chapter 4 of the Constitution of Kwa-Zulu-Natal, 2005 (KZN Constitution) captures an unfair differentiation amongst the existing monarchies contrary to the constitutional force. The Constitution dictates that all monarchs or tribal leaderships must be equally recognised. The KZN Constitution recognises one monarch that is the individual holding office as the King of the Zulu Nation, Ingonyama. It is not clear what becomes of the other Kings and Queens or Chiefs within Kwa-Zulu if the KZN Constitution recognises only the Zulu Ingonyama monarch.

This concern is raised within the context of CP XIII (2) requiring provincial constitutions to recognised monarchs in the same manner as does the Constitution in section 143(b). S143 (b)) of the Constitution stipulates that a provincial constitution, or constitutional amendment, **must** not be inconsistent with the Constitution, but may provide for the institution, role, authority and status of a traditional monarch where applicable. Contextualising these provisions within the interpretation principle that a singular phrase or word also encapsulates the plural, all monarchs are recognised by the Constitution due to CP XIII (2)¹⁶⁶ which dictates recognition of all legitimate traditional monarchs. The KZN Constitution's stipulation

¹⁶² Consider the Modjadji's history in the Northern Province and Kwa-Zulu Natal through the Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 of 1990).

¹⁶³ *President of the RSA and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 41.

¹⁶⁴ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC)

¹⁶⁵ 2013 (4) BCLR 431 (CC) para 63

¹⁶⁶ Provide as follows:

Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch **shall** be recognised and protected in the Constitution.

is contrary to both CP XIII and section 143(b) of the Constitution and unlawfully restricts the recognition of other existing monarchs in Kwa-Zulu Natal Province¹⁶⁷.

The Constitution is a transformative living document¹⁶⁸ that has the potential and capability to transform the society to a just, democratic and equal society. Thus law as a thread in social fabric must be properly used to strengthen the fabric and build strong self-determined equal societies. Since the right to human dignity and equality dictates human worth¹⁶⁹, humanity demand the right to life as a human being and the human life quality to be one's own master in the personal arena.

The rationalisation of traditional courts' legislation and use of customary law justice system outside the proper court system is arbitrary and could become unfair treatment¹⁷⁰ prohibited by section 9 of the Constitution.

A proper rationalisation of pluralism must equally recognise all diversities.

Legal representation

A traditional court setting in terms of Bantu law never permitted legal representation. Prohibition of legal representation is a constitutional concern coupled with lack of clarity whether traditional courts are courts in terms of section 166(e) when they are granted jurisdiction of courts envisaged for judiciary authority.

The indigenous justice system is closely similar to the western courts justice system but different in two exceptions. One is that traditional justice system does not recognise legal representation. Secondly the original native's courts never distinguished between a civil and a criminal claim¹⁷¹. Generally indigenous justice systems do not create a dichotomy or recognise any distinction in form or substance between civil and criminal liability¹⁷².

Legal representation came with the constraints of the British rules of evidence¹⁷³. It is an apparent pattern that most Bantu systems did not entrench legal representation¹⁷⁴. Duff notes that cases against Europeans followed a totally different position from those of the natives. He states that litigation involving Europeans required a knowledgeable trained lawyer and was handled by the High Courts in Central Africa but for the black natives, the judicial code and its administration was too simple and direct¹⁷⁵ to require legal minds.

According to section 3(3)(a) of PAJA, the administrator may give a person, whom his rights may be materially and adversely affected, an opportunity to obtain assistance and, in serious or complex cases, legal representation. The notion of no legal representation in customary justice system is also prominent in South Africa. However, if traditional courts are administrative bodies, the constitutional jurisprudence and the right to just administrative

¹⁶⁷ ANC v Minister of Local Government and Housing 1997 (3) BCLR 295 (CC)

¹⁶⁸ Karl Klare, legal culture and transformative constitutionalism (1998) 14 SAHRJ

¹⁶⁹ Ackermann: chapter 3, Arthur Chaskalson, Human dignity as a foundational value of our Constitution, the 3rd Bram Fischer Lecture (2000) 16 SAJHR.

¹⁷⁰ S v Makwanyane and Another 1995 (6) BCLR 665 (CC) (Makwanyane), Judge Ackermann at para 156 to 157 where he shows that an arbitrary action or decision making can never be capable of possessing a rational explanation why people must be treated substantially different.

¹⁷¹ I understand Holomisa to argue that there is a customary distinction but the cases can be tried together.

¹⁷² Bennet: 145.

¹⁷³ Duff.

¹⁷⁴ Holomisa and Rugege

¹⁷⁵ Duff:327

action changed the landscape found in customary systems with regards to legal representation.

It is not clear whether traditional courts in terms of the TCB shall be administrative bodies like the small claims court or the CCMA, because if they are, then PAJA has application. It is a difficult task to argue prohibition of legal representation and its constitutionality¹⁷⁶ where the traditional courts are said to be distinct from courts of law but also not administrative bodies, especially where the dispute may be complex and serious. Put in plain English, I do not know what traditional courts are. In my view, traditional courts could be established similarly as small claims courts in terms of section 2 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984) or the CCMA as alternative administrative bodies in terms of PAJA.

It is trite that there is no absolute right to legal representation in other forums or administrative bodies other than in a court of law¹⁷⁷ on criminal matters. Hence if traditional courts are not courts of law a legal representation prohibition could be lawful, but that does not rectify the position to prohibit legal representation whilst the law on the same breath grants criminal jurisdiction.

Clauses 13 and 14 of the TCB dictate appeal and review grounds that are technical and legal in nature. A lay person who has no legal background or training will be unable to determine such grounds. Furthermore the appeals are restricted only to the sanction and not the merits. Legal representation is necessary to give effect to these shortcomings.

Within the indigenous justice system the warning against self-incrimination and legal representation as available in the European system entrenched under section 35 of the Constitution was proscribed. Section 35(1) of the Constitution codified the rule against self-incrimination for criminal matters. The lack of legal representation in customary criminal justice system explains the stance of the Justice Department and draft policy that restricts such a right. But an attempt to rationalise traditional systems and the grant of criminal jurisdiction to natives' courts must recognise the application of sections 35(3) (c), (f) and (o) of the Constitution.

The prohibition of legal representation where criminal jurisdiction is granted becomes unconstitutional if it contradicts section 35(3)(f) of the Constitution. TCB expressly prohibits legal representation but grants criminal jurisdiction to traditional courts. Accepted, the legal representation prohibition in traditional courts differs from that in small claims court. Section 7(2) of the Small Claims Court Act¹⁷⁸ is completely distinguishable in that small claims court is not a court of law but statutory administrative body like the CCMA, with civil adjudicative powers and not criminal jurisdiction.

The argument to legal representation under section 35(3) focuses on the rights of arrested persons. In our context this refers to those who have transgressed customary law. In the African traditions a wrong act is a wrong regardless whether the consequential end result is in a form of compensation or restoration of peace and maintenance of societal cords or to render punishment.

¹⁷⁶ Law Society of the Northern Provinces v Minister of Labour and others [2013] 1 BLLR 105 (GNP)

¹⁷⁷ See Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others 2002 (5) SA 449 (SCA) (Hamata), MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani (2005) (2) All SA 479(SCA), CCMA and Others v Law Society of the Northern Provinces (005/13)[2013] ZASCA 118 (20 September 2013) at para 19.

¹⁷⁸ 61 of 1984

It is important to accept the notion that no legal system, once legitimised, can permit citizens to make choices on whether to obey the system or not. It is trite that whenever a penalty is accorded to a crime by a legal system the penalty is likely to deprive or impinge on an existing legal right. The criminal jurisdiction determined for traditional courts provides a mandate to punish wrongdoers in a traditional rural setting by a traditional court. Then there is no justification to limit the right to legal representation in this instance. Clause 9(3)(a) of the TCB is conclusively unconstitutional, especially if traditional courts will be administering justice and have criminal jurisdiction. This limitation is not justified in terms of section 36 because once there is criminal jurisdiction section 35(3) finds application.

In relation to criminal jurisdiction determined by the TCB for traditional courts, the prohibited legal representation infringes s 35(3) legal protection accorded to accused persons. Clauses 3(1)(b),(d), 3(2)(a), 9(3)(a) read with 13 and 14 of the TCB are contradictory to section 35(3)(c)(f)(g)(j)(k) and (o) of the Constitution. The denial of the right to legal representation is problematic since the Bill fails to stipulate with certainty whether or not traditional courts are courts of law¹⁷⁹. In contrast, to arguing the prohibition of legal representation at the small claims court¹⁸⁰ or CCMA, same argument cannot be used because those forums deal with civil issues and not criminal matters.

The prohibition of legal representation is depriving arbitrarily the right to legal aid. Prohibiting legal representation is discriminatory and unfairly denied to accused persons in traditional settlements and discriminatory if this law applies to blacks only. This stipulation results in further denial to people in traditional areas who accept the authority and legitimacy of the traditional authorities, of the right vested by section 35(3) (g) and (h) to be assigned a state paid legal practitioner, by virtue of being black. By prohibiting legal representation then legal aid is limited to "other people" that live outside tribal settlements and not those who will be tried in traditional courts.

In terms of section 83(1) of the Child Justice Act¹⁸¹ a child may not waive the right to legal representation in certain circumstances. Perhaps the appearance before traditional courts is one such "circumstance" where the child must be denied this right, especially since there is no restriction on child justice jurisdiction in traditional courts in terms of the TCB. However, it is pointless why the Child Justice Act would make this provision paramount in recognition for the protection of children rights and wellbeing when the TCB can just disregard the section 28: Constitution injunction. Herein, it is inconceivable that there could be instances where a child need not be legally represented¹⁸², especially in criminal trials.

Clause 9(2)(a)(ii) of TCB reference the protection of children, so this strengthens my observation that children are not excluded from the traditional courts' criminal jurisdiction. Section 28(3) of the Constitution defines a child as a person under the age of 18 years. Without that explicit prohibition on traditional courts to try criminal cases involving minors there is a glaring unconstitutionality in administering child justice.

¹⁷⁹ If the TCB was taking the interpretation of the Constitutional Court of section 166(e) read with schedule 6 item 16 which declares that traditional courts **could be courts of law**, entitlement to and restriction of legal representation becomes a constitutional legal issue.

¹⁸⁰ Public hearing submission from the Eastern Cape SAWLA representative.

¹⁸¹ Act No. 75 of 2008

¹⁸² Para 25 of S v FM and Centre for Child Law (Amicus) case no: A 263/12 in the North Gauteng High Court (Pretoria).

Prohibition of the right to legal representation in criminal cases is unconstitutional and can only be restricted if traditional courts are not courts¹⁸³. If legal representation is prohibited in the processes of traditional courts therefore traditional courts should not be granted criminal jurisdiction to address criminal cases.

¹⁸³ Hamata.

Chapter 4

Traditional justice and Constitution

This chapter concentrates on the Constitution's dictates on how the rationalisation of traditional courts' old legislation should be handled. It analyses government documents like the national policy on traditional leaders and traditional justice system, South African Law Reform Commissions' (SALRC) relevant reports, and Traditional Courts Bills introduced to Parliament in 2008 and 2012, with the idea to practically outline the legislative process. In that scrutiny, I wish to reiterate the awareness that it may be impractical to have a parallel existence between the entrenched human rights and the past¹⁸⁴ where South Africa comes from. The constitutional regime entrenched the bill of rights in order to clean the past conflicts and break away from the deceitful and unimaginable past, whilst incorporating "universalism". For clarity of the point Chanock says:

'...Human rights have depended on the deliberate (bitterly opposed) active remaking of a new order, on a denial of the past, on a reinvention of political mythologies, not simply on an evolution of what had been historically culturally acceptable. In doing this, the rights maker have specifically reached out towards universalism, and very often explicitly away from "culture" in a more specific sense.' ...

Constitutions everywhere are a social contract to bridge and break from the past and move to a better future. I accept D'Amato's definition of system¹⁸⁵ which means a "mechanical or theoretical organisation of components, distinct from its environment but add something new and often unexpected to the initial understanding of the ensemble of components out of which it was construed". Relevantly to indigenous justice system, a system can also be a self-organised collection of elements that are interconnected in the sense that any force imparted to one of them affects the positions of all others. The distortion to customary law by colonisation and apartheid broke the interconnectedness the traditional system shared which process created a weak system.

The traditional justice system existing prior colonisation was not a system of record but the colonisation record of this system, attempted to record customary laws of the African people in a distorted, "dead"/ fossilised, or "official customary law"¹⁸⁶. Recording was the European people's idea. The old order legislation or colonisers' common law "fossilised" customs whilst fusing English law and creating legal framework beneficial to them as the official customary law and that process killed the living customary law. Due to the death of living customary law a huge transformation element is necessary uphold a proper living customary law. I thus applaud the processes that were followed in the Shilubani king/queenship to restore the traditional royalty to the daughter of the original King as outlined in the Constitutional Court judgment. This example speaks exactly to the possibilities that living customary law can branch into.

¹⁸⁴ Chanock, pages 15-36

¹⁸⁵ Anthony D' Amato, International Law as a unitary system, Routledge Handbook of International Law, David Armstrong (ed).

¹⁸⁶ The difference between living and official customary law lies in that the official is recorded whereas the living customary law is the daily lived customary law applicable today and evolving with the African people. Living customary law is law that is developed and applied as those who live it continue to use and adapt it. A Claasens: 'Traditional Courts Bill in the Context of Other Laws Dealing with Traditional Leadership' <http://www.lrg.uct.ac.za/lrg/docs/TCB/2012/tcb>. Phathekile Holomisa, According to tradition, Essential Books, 2009

South Africa did have native courts or customary courts called the chief's courts¹⁸⁷. When the confusion manifested statutes like the BAA and Native Administration Act, Chiefs Courts Act were promulgated as nothing more but the construction of apartheid order to bolster their ulterior motives. In a critical analysis of the BAA, this Act never gave complete authority to establish a traditional court, as seen in sections 12(1) and (2) together with 20 of the BAA but powers to confer limited civil and criminal jurisdiction. Section 20(4) of the BAA further empowered the Minister with the prerogative to revoke traditional jurisdiction to administer justice at any time without even justification.

The progression from colonisation to apartheid and transition to a democratic state proves that indigenous people were at all times utilising traditional systems to determine policies and administer justice. They had their courts called inkundla, their legislatures known as amaphakathi and the traditional councils to run that administration. The old order legislation based on racial segregation coined the "English native courts" to administer the European justice on blacks. The "English native courts" were courts trying black people utilising English law or common law and recorded or recognised customary law. As pointed above, chief's courts were left to administer the customary law in terms of section 12 and 20 of the BAA. This illustrates that as early as prior 18th century to apartheid years an apparent distinction existed between traditional courts and English native courts of law. Traditional courts were not courts of law back then.

Borrowing the notions of hard, soft and non-law¹⁸⁸ in defining the status of international treaties, may I use these terms in this context. Hard law is a source of rights and obligations that create enforceable rights. In the context of my thesis hard law is a binding rule and would include the Constitution, statutory law, common law and customary law. Soft law and non-law include community practises, academic opinion, etc, which have persuasive value but no binding and enforceable authority. Chapter 12 of the Constitution, TLGFA, the Native Administrative Act and BAA provide legal framework and legitimacy for customary justice and these constitute hard law. The traditional justice system ensemble a number of old and new components of African traditions and the state as an artificial construct¹⁸⁹ through the mentioned hard law dictate and make continued legal framework for indigenous law.

Arguing that complex systems tend to be more stable than simple systems, complexity is no reason to discard the customary law system. Traditional justice ways are said to be complex and are not easily understood by the western cultures. My argument is that those who prefer

¹⁸⁷ Sections 12 and 20 of the BAA empowered the Minister to authorise a black chief or a **recognised** or **appointed** headmen to hear and determine civil claims. The section conferred jurisdiction to the traditional authority to try and punish blacks who have committed civil debts or criminal acts against each other. The traditional courts' jurisdictions were not extended to non-blacks. The two sections found the civil and criminal jurisdiction of traditional courts. Therefore criminal and civil jurisdiction is apparently not a birthright even though traditional chieftaincy had means to maintain social stability as argued. The conferment of this jurisdiction was the prerogative of the Minister and no one else. As illustrated by s12 (b) where the Minister did not freely authorise jurisdiction but any chief, headmen could request the conferral limited to try blacks. BAA provided a restriction to regulate divorce, separation or nullity of marriage, third schedule on criminal jurisdiction restricted bigamy, crimen injuria, pretended witchcraft and incest (only mentioning the relevant ones to my thesis).

¹⁸⁸ Jaclyn Ling-Chien, Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination under CEDAW, Human Rights Law Quarterly (35) No4, November 2013 at page 917

¹⁸⁹ Anthony D'Amato see pg 102 *ibid* and Judge Didcott in para 57 of *Azapo* where the state is referred to as an impersonal entity.

to live traditionally must be given a chance with proper recognition and infrastructure to implement customary law despite the system perceived to be complex and unconstitutional.

Following the notion from Pitt Cobbett that a custom is like footsteps that eventually become a path habitually followed by all, the modern writers came up with what is now understood as a custom¹⁹⁰ and for blacks in the traditional justice that is customary law. Customary law is not uniform¹⁹¹. South Africa has both official and living customary law. The living customary law is not distorted and past women exclusion is evolving with times even though slowly with the advent of the Constitution¹⁹² and appropriate legislative measures. Lack of women participation¹⁹³ has been the serious contestation grounding the unconstitutionality of customary law.

Law making process

Law making process entails three steps. First one is policy making stage and initiation by the executive in terms of section 85(2) of the Constitution. The second stage entails involvement of the legislatures either Parliament, provincial legislatures and local government councils through a legislative process to pass a bill. The third stage is the confirmation by the President that the bill is consistent with the Constitution, where the legislative proposal (bill) is proclaimed as law and implemented by the executive to the benefit of citizens. The third stage involve the judiciary wherein if the President, in terms of section 79 of the Constitution is not satisfied with the constitutionality of the legislatures' passed bill, and has constitutional reservations may request the Constitutional Court for a decision on the constitutionality of the bill and its validation.

Section 79 of the Constitution provides a prerogative to the President when dissatisfied with the constitutionality of the proposed legislation to refuse to proclaim into law a bill where s/he has reservations and instead refer the proposed legislation to the Constitutional Court or recommit it to the National Assembly. The stage to repeal or amend existing law or rationalise legislation forms part of the law making function. In that instance, since section 212(2) read with schedule 6 item 16(1) enables legislatures to repeal or amend legislation or customs governing traditional authority, Parliament can repeal all laws relating to traditional courts. It can be argued that such repeal is contrary to the dictates of the Constitution¹⁹⁴, I differ.

Alternatively, as the elected legislatures are constitutionally mandated to develop customary law in a manner that upholds the spirit and purport of the Bill of Rights whilst courts can do so when there is litigation before them, it is the courts of law or the elected legislatures who can constitutionally deal with this constitutional dilemma, without necessarily declaring traditional courts as courts of law.

¹⁹⁰ D'Amato explained the custom process in the context of international customary law whilst preferring to call customary international law as 'general international law' which in this instance, that analogy will be used in explaining a custom that translates into customary law in relation to traditions and cultures of indigenous communities.

¹⁹¹ Mayelane v Ngwenyama CCT 57/12 [2013] ZACC 14 at para 51.

¹⁹² See Shilubani

¹⁹³ See experiences shared by women from different provinces in Claassens: fn 65.

¹⁹⁴ As the interpretation of section 166(e) may differ since the Constitutional Court found that traditional courts could be 166(e) courts. I disagree, traditional courts should be administrative bodies not courts of law in terms of section 166 of the Constitution. Also Discussion Paper 82, Project 90 of the SALRC, The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders, May 1999 at page 6, 3.1.2

As the court said in *Natal Joint Municipality*¹⁹⁵ there are many stakeholders in the legislative making process even Parliament cannot fully own the process. The Supreme Court of Appeal (SCA) in this judgment averred positives of public participation's influence as well as where lack thereof may have fatalities on the Parliament's legislative end product. The TCBs are so unsatisfactory drafted and create wonder what became of the NA public views in 2008 – 2011 and valid arguments that could have shaped the other 2012 Bill. It seems the public views shared on the 2008 TCB were ignored since they were not incorporated in the re-introduced TCB in 2012. As stated the 2012 TCB was the same word for word and years mentioned as that introduced in 2008.

Even the draft bill from the SALRC to the Department of Justice some years ago, was well investigated and incorporative of the investigated people's views, but was not considered to influence the current TCB. That SALRC draft bill was ignored completely just like public hearings and submissions of the NA Justice Committee.

Sufficient research and discussion papers¹⁹⁶ have circulated and state resources used to produce the work done by traditional leaders and traditional courts which does not seem to influence the work that was processed through the TCB. The whole point for the involvement of many role players during the legislative process must pay off at some point but it seems not to be the case with this Bill¹⁹⁷.

It is not the introduction of a bill that infringes the rights but application of the law once the proposed legislation enacted without citizen consultation affects the rights¹⁹⁸. Since the TCB is still undergoing the enactment process, no rights are infringed yet. However, through lack of certainty and meaningful consultation rural people are suffering. Effective public participation dictates that whilst Parliament is still deliberating on what is appropriate to enact, people must be heard and given opportunity to voice out experiences that may at least influence the end result¹⁹⁹. Currently the TCB is a statement of the executive which Parliament must scrutinise and interrogate until the TCB executive's policy is refined or approved into law²⁰⁰ by both the legislature and President. However, if the TCB is approved in its current form and once the President proclaims it as law, it shall definitely be confronted with various constitutional challenges. It will not pass constitutional muster.

Section 85(2)(b) and (d) of the Constitution confers to the executive a duty and power to develop and implement national policy, initiate and prepare legislation. Rautenbach defines policy as a plan, course of action, strategy or programme for action and advises that policy-making is a multi-dimensional task²⁰¹. Policy making is an ongoing process essential to government branches. Rautenbach further says, 'it is wrong to rigidly assume or find that the Constitution assigns policy-making in general only to the executive'. This contention is aligned with the finding of the court in *Sidumo and another v Rustenburg Platinum Mines Ltd*

¹⁹⁵ *Natal Joint Municipality Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012) at para 20.

¹⁹⁶ Examples include work cited here and work of the Centre for Law and Gender Unit, University of Cape Town especially volume 35 SA Criminal Quarterly Report, 2011.

¹⁹⁷ The stalemate experienced by provinces during the second consideration of provincial negotiating mandates in 2014 is illustrative of this concern.

¹⁹⁸ See *Glenister v President of RSA* 2011 (7) BCLR 651 (CC) (Glenister) at para 47.

¹⁹⁹ Doctors for life

²⁰⁰ See para 51 of Glenister.

²⁰¹ IM Rautenbach, Policy and judicial review-political questions of appreciation and the South African Constitution., *Journal of South African Law* 2012 (1), TSAR (Tydskrif Vir Die Suid-Afrikaanse Reg) Juta page 21-34.

and Others [2007] 12 BLLR 1097 (CC) stressing what was said in Fedsure²⁰², SARFU²⁰³ and Pharmaceutical that the functionary is not so crucial in the exercise of public power but it is the function itself and its implications that are of concern.

Government policy on traditional courts must evolve with times, consider social challenges and give effect to the intention of the Constitution's section 195 (1) (e), schedule 6 item 16(6)(a) and the whole Constitution.

Rautenbach correctly points that the Constitution only describes the functionary or persona to whom eventually and responsibly the function should be exercised. Law making process can be initiated possibly from any branch of government and constitutional provisions²⁰⁴ attest with necessary observed limitations of vested powers.

According to the Constitution's design and Glenister²⁰⁵, policy-making or its development must be preceded by legislative and executive action. The 2002 Draft White Paper on traditional leadership and governance stipulates that 'traditional leadership is a creature of customs and carries out customary functions where traditional authority could compliment government's role in rural areas, **but this complimentary role cannot be construed to mean that traditional leadership is in contestation with the government levels or state organs**. This is very clear; hence the outsourcing of functions that are not completely customary is a conflict contrary to the constitutional imperatives and government design.

The common law principle of *ultra vires* or legality enjoins any government institution exercising public power as a creature of statute to exercise a public duty or power that is statutory or constitutionally prescribed²⁰⁶. Traditional leaders derive powers from royal ancestry and royal families²⁰⁷ which in terms of the Constitution and CP XIII²⁰⁸ and XVII²⁰⁹ suffice to cater for the required prescribed law to legitimise customary law authority.

In terms of chapter 12 of the Constitution recognition and implementation of customary law must be clear and the role for traditional leadership. This recognition does not empower the unlawful and unfair outsourcing done by government through the proposed traditional justice system.

Once law is made by the legislature and implemented by the executive there is a triad formed between the executive, the legislatures and courts. Courts interpret the law and provide authoritative meaning and proper application of law. The courts also feature when a

²⁰² Fedsure

²⁰³ President of the RSA and Others v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC)(SARFU).

²⁰⁴ Sections 7(2), 39(2), 43, 55(1) (b), 68(b), 85(2)(b), 125(2)(d) and 156(2) of the Constitution.

²⁰⁵ Glenister at para 29 to 26.

²⁰⁶ SARFU, Fedsure and Pharmaceutical.

²⁰⁷ The words of Soko Risina Musoro by H.V. Chitepo s quoted by Basil Davidson: "I ruled with the power that comes from my forefathers, the power without beginning..... at page 43.

²⁰⁸ Provide that the institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

²⁰⁹ Stipulate that at each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

person's, rights are infringed, where a court of law or appropriate, independent and impartial tribunal, must address the dispute through the application of applicable and relevant law²¹⁰.

Generally, resorts to courts should be the last remedy once all other state established, effective available mechanisms have been exhausted. If the TCB envisions traditional courts as a first port of call form of mediation structure within traditional society that I accept. Resorting to courts as the last measure is very important, hence favouring the distinction that traditional courts are not courts of law rather are justice tribunals²¹¹ as mediation and arbitration bodies within the tribal settlements. Since resort to courts must be the last resort, the courts should defer their interference²¹² and allow the full exhaustion of other available remedies equitable to all citizens.

Courts' intervention is constitutionally acceptable and permissible once the executive arbitrary implements legislation or where the legislature, under clearly defined circumstances, fails its constitutional role.

For the customary justice systems' policy development, the executive has taken the initial step by developing and publishing the Draft Policy Framework for the Alignment of the Traditional Justice System with the Constitution, 2009 (Draft Policy), the 2002 Draft Policy on traditional leadership and governance and introducing the TCB before Parliament. The SALRC's reports and investigations form part of the executive initiation process in terms of section 85 of the Constitution. The Draft Policies seek to affirm the recognised place for traditional methods of administering justice consistently with the inherent traditional values of indigenous communities²¹³ and the role of traditional leaders as advisory²¹⁴ and complimentary to government.

Properly applying the principle of separation of powers, the efficiency of the checks and balances to ensure that control and checks on the power vested within each government arm remains promoted and eventually section 34 of the Constitution should be utilised here as a consequence of section 85(2)(d) and section s 76 read with section 79 of the Constitution.

Section 34 of Constitution and TCB

Section 1(c), the rule of law principle and the thread in section 34 of the Constitution are clear obligations on the state to provide proper efficient mechanisms for citizens to resolve disputes²¹⁵. In line with the finding of the court in Chief Lesapo a number of considerations must be taken into account when making appropriate decisions on the structure, functions, operation of traditional courts and the applicable customary law.

²¹⁰ Sections 34 and 38 of the Constitution. The applicable law could be customary law, common law, and any legislation including constitutional law.

²¹¹ Holomisa calls them justice courts, a name applicable to the section 166 courts. I would prefer customary justice tribunals.

²¹² In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) Constitutional Court spoke of the *trias politica* and the necessary deference by courts and not usurping powers of other government branches.

²¹³ Chapter 6 point 6.1.2 of the Draft Policy at page 30.

²¹⁴ Interview with Deputy Minister of Cooperative Governance and Traditional Affairs, Yunus Carrim (as he then was), in SA Crime Quarterly No 35, March 2011.

²¹⁵ Para 39 of *President of RSA and Others v Modderklip Boedery and Others* CCT 20/04 see also Chief Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC) at para 22 (Chief Lesapo)

For judges all over the world, the source of law is similar in almost all respects²¹⁶. All judges look into custom, judicial precedent, judicial notice, legislation, equity, morality, public policy and the laws of physical nature, international treaties or declarations and common law to construe and apply the appropriate law in any dispute. Following the history of the Africans, Gluckman defines the nature of law "as a body of rules of right doing, regularities of nature, particular judgments and statutes, the traditional conception where law means the things that ought to be done". Further on he says law "is a set of rules accepted by all normal members of the society to define right and reasonable ways in which persons ought to behave in relation to each other and ways to obtain protection for one's rights". (Davidson: 46-48). In South Africa, the Constitution is the supreme and primary source of our law.

This law definition bears no difference from that of the common law, constitutional law or customary law. Nothing man made as law, cannot evolve, even the Constitution gets amended and beliefs change upon social influences.

The traditional justice system is founded on customs and most traditional courts' decisions follow customs. Soga²¹⁷ describes customs as the 'handmaids of law powerful as corrective force that binds together the tribe.' Soga distinguishes law from custom by defining law as sanctioned by the community and as the appointed rules for the control of the whole community. Whilst, custom is a long established usage or practice that has become habitual conduct of the inhabitants with legal sanctions. Soga called custom the habitual practice which does not necessarily become positive law. For instance the habitual practice that refused women and girl dependants of the same male to inherit either as children or wife of the deceased²¹⁸ that was custom. The official customary law turned such custom into law.

The crucial connection between custom and law is that in customary disputes or indigenous justice system, custom is customary law. Customary law are customs and usages traditionally observed among indigenous African people of South Africa²¹⁹. Together the customary law, custom and at times religion, mould the individual and eventually the society to create and maintain the balance, power²²⁰ and stability mostly achieve by the rule of law and what culminates into positive law.

In western cultures customs²²¹ are not law but they support and provide strong pillars and are a primary object to law, whereas for Africans customary law is customs. Customs in western cultures are somewhere in between being non-law or soft law because they have some confirmatory value. In traditional systems, customary law as customs are hard law with binding authority. Since customary law is hard law and is founded on customs, the flexible nature of customs render the flexibility and non-uniformity challenge real.

South African "native courts" not "English native courts" are referred to in different languages due to numerous clans existing. Colonisation termed them "native courts" promoting the notion of "foreign natives" which has been adopted into some other statutes²²². It is worrying

²¹⁶ Gluckman at page xiv.

²¹⁷ At Soga: 46 Xhosa law.

²¹⁸ The primogeniture principle explained in Bhe.

²¹⁹ Mothokoa Mamashela, New families, new property, new laws, (2004) 20 SAJHR

²²⁰ Chanock:Mamdani (ed) 2000

²²¹ Ibid

²²² Section 1 of the Law of Evidence Amendment Act, 1988 (Act No.45 of 1988), noting that customary law is equated to law of a foreign state. 1(1) provides judicial notice for customary law in the same breath as that provided by the constitution. 1(4) of the same Act defines indigenous law or custom as the law applied by Black tribes in the Republic.

how European based law could call the aboriginal indigenous people “foreign natives” when the term native connotes that you are of origin. The two words are contradictory and such use illustrates the confusion that the European riddled to the customary law²²³.

TCB defines a traditional court as a court established to be part of the traditional justice system functioning in terms of customary law and custom. This definition contradicts clause 7 of the TCB. It does not state who establishes them. Perhaps based on the assumption that traditional monarchs have already established traditional courts, the Department of Justice did not see necessity to clarify the functionary that establishes these courts or took for granted the establishment by old order legislation. This confirms the distinction that rationalisation is not establishment process of indigenous courts. Hence, even if there would be legislation on traditional courts enacted in terms of section 166(e) of the Constitution, there still would not be a proper established traditional court in sync with the 166(e) provision.

Historically the hierarchy of traditional courts has many levels that the TCB ignores. There are courts constituted by community male elders²²⁴ who meet to resolve any disputes among communal natives. A traditional court is not constituted by a single person presiding as a judge or magistrate like in the western court system. Numerous figures constitute “Ibandla”, chiefs’ court, headmen court, family courts or clan court. The traditional court process could be likened to that of the jury or the assessors system.

The traditional justice system is defined as a system of law based on customary law and customs. There are about 1 500²²⁵ traditional courts in South Africa. Apparently a strong alliance²²⁶ promotes traditional courts. Most opposition to traditional courts as courts of law stem from women’s organisations²²⁷ or individuals. Generally there is support for the continued existence of traditional courts, as long as such courts are not courts of law. The Rural Women’s Movement prefers that traditional courts rather be declared as arbitration forums²²⁸.

SALRC reports held that legitimate headmen’s or chief’s court could be constituted in many ways. The election or appointment of those constituting such a court could either be by the Chief from the family relatives²²⁹ or elected by the community. The Durban Workshop participants, as members of the respective Traditional Councils, were elected via democratic elections conducted by the Electoral Commission in line with the TLGFA²³⁰. Where the

²²³ In *Mabuza v Mbatha* 2003 (7) BCLR 743 (C) at para 30 the court declared that it is no longer necessary to prove customary law as foreign law.

²²⁴ D Bogopa, A critique on traditional courts, community courts, the conflict management, *Acta Criminologica* 20(1) 2007 and Claassens’ tribal taxes article. Holomisa argues that women participation is given effect in current traditional proceedings contrary to the views shared by Bogopa.

²²⁵ Bennett: 141 quoted with affirmation by the Law Commission’s Discussion Paper on Traditional Courts and the Judicial Functions of Traditional Leaders.

²²⁶ The public hearings on Traditional Authorities, May 1995 of the Constitutional Assembly, press statement issued pursuant the meeting of the Traditional Leaders Working Committee, Phokeng 6th September 1996, submission of Chief Mangosuthu Buthe to the Constitutional Review Committee for the 2012 constitutional reviews and Jennifer Williams and Judith Klusener, *The Traditional Courts Bill: A Woman’s Perspective* (2013) 29 SAJHR.

²²⁷ The Rural Women’s Movement, Nomboniso Gasa and the women’s 2012 submissions before Select Committee’s public hearings.

²²⁸ See page 10 of Project 82 SALRC and the 1995 submission of the Rural Women’s Movement to the Constitutional Assembly’s Ad Hoc Committee on Traditional Leaders.

²²⁹ Page 7 of Project 90 Law Reform Commission and Holomisa.

²³⁰ S 3(2)

traditional court does not include the elected members of the traditional council since the Chief or King has a prerogative to have only the royal members constitute a chief's court²³¹, if the court will be the traditional council, the professed independence and impartiality can lack or hamper principles of fairness. With the process in clause 4 of the TCB, many other similar challenges are possible.

The heightened involvement and participation of women in the structures of traditional leadership is possible²³². I do not concur with the argument to disband traditional courts as courts of law or administrative body based on the women discrimination reasoning because there are legal measures to address that concern.

The official customary law is a men's perspective minutely incorporating the practised primitive law of the African people, since when it was codified women did not have prominent role other than on issues concerning women. Some say colonisation brought civilisation, if true, the argument that civilisation and the law attempted to remove vengeance in civilised societies²³³ so that people do not personally revenge their grievances and disputes, has little substance in the African context. A fact is that traditional court systems already existed prior to colonisation, even though it excluded women as decision makers. The kings and traditional leaders ruling during colonisation already had traditional courts and such structures maintained the social fabric²³⁴ and ensured that communities do not self-destruct through self help mechanisms.

African societies share a moral communal collective order as opposed to the individual order notion from the West. The indigenous system promotes communalism. "The good of the individual is a function of the good community, not the reverse (Davidson: 70). Communalism is found in the expression "Umntu ngumuntu ngabantu". The vast contrast between African and Western cultures continues even on what could be crimes.

Some submissions²³⁵ illustrate that other traditional leaders use the traditional system to get vengeance against subjects that do not see eye to eye with them. It is important that if the traditional court structures are to possess any state duty, credence and legitimacy in their operation must be above reproach as expected of section 166 courts and section 34 structures.

Section 34 of the Constitution grants everyone a right to have any dispute "that can be resolved by the application of law" decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The main primary right in section 34 is access to a court of law, the "civilised vengeance". The other "independent and partial tribunal or forum" access is added as secondary to a right to resort to a court of law envisaged in section 166 of the Constitution.

²³¹ See affidavits used in Pilane cases to explain this prerogative.

²³² Sections 3(2)(b), 28 of TLGFA, Shilubani and Holomisa

²³³ Eduardo Couture *The Nature of Judicial Process* (1950) 25 *Tulane Law Review* 1 at 7 as quoted in *Concorde Plastics (Pty) Ltd NUMSA and Others* 1997 (11) BCLR 1624 (LAC) at 1644F-1645A.

²³⁴ Saunders.

²³⁵ The Manyeleti Community Property Association and Land Claim and the Peotona Group Holdings (Pty) Ltd (Peotona) amongst the 2012 TCB submissions to the Select Committee together with Dr Mnisi-Weeks's papers discussing Dalindyabo criminal cases.

According to the “civilised vengeance”, analysis by Eduardo, a formal resort to a court is civilisation’s substitute for vengeance²³⁶. This “civilised substitute for vengeance” consist a legal power to resort to the court of law and other appropriate tribunals.

Since the Constitution recognises customary law as law²³⁷ it must follow that customary disputes are included within the ambit of section 34 to be addressed by courts of law or other tribunals. Natural justice is also a legal requirement necessary in disputes of customary law. As demanded by the instructive words of section 34, a court of law or administrative tribunal must be independent, impartial and unbiased to give effect to justice. Hence if traditional courts must handle any dispute in terms of the constitutionally recognised indigenous law as a mechanism to uphold justice; such process somehow entails a judicial process²³⁸ within the ambit of section 34 of the Constitution. Traditional courts can be statutory administrative bodies like the CCMA and small claims court without being courts of law even if they are empowered to perform some adjudicative functions.

Customary law recognition

CP XIII (1) provided that indigenous law must be recognised subject to the Constitution. This principle meant that legislation dealing with traditional authorities and application of customary law must be constitutionally compliant. This directive was translated into section 211 of the Constitution and enjoined the recognition of the institution, status and role of traditional leaders according to customary law to be done subject to the Constitution and any applicable legislation and customs. In other words the existence and application of customary law must comply and be consistent with the Constitution²³⁹.

According to section 211(3) of the Constitution, courts are mandated and should apply customary law subject to the Constitution and relevant legislation. Sections 12 and 20 of the BAA²⁴⁰ prescribed the delegated judicial function to traditional leaders. In so far as the TLGFA²⁴¹ and the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009) is concerned Parliament has complied with section 212(2) of the Constitution.

In line with sections 211²⁴² and 212²⁴³ of the Constitution, the other courts, if traditional courts are not recognised as courts of law, must properly apply customary law. This proposal

²³⁶ The theme song for the “colonialist paternalism” that says Black people were not and could not be civilised if left to their own devices. (Davidson: 45). Discussing the founding ancestors, Davidson inputs that Dean Farrar writing about Africans as early as in 1865, stated only the negatives in everything they did and believed. Farrar is said to have graciously said “Left to ourselves as Africans, we are beyond salvation”.

²³⁷ Bhe at paras 212 and 235, Ngcobo’s judgment, which confirms we are a pluralist country with other lawfully recognised legal systems.

²³⁸ Paragraph 13 of Chief Lesepo

²³⁹ See Shilubani para 42-44.

²⁴⁰ And the Native Administration Act, 1927 (Act No. 38 of 1927) which gave rise to tribunals as the first level of bantu courts operated by chiefs and headmen, then the second level was the native commissioners’ courts which took away jurisdiction to magistrates’ court for natives where a native commissioner’s court had been established. The hierarchy created the Native Appeal Court. The Supreme Court of Appeal retained its appeal function for appeals from these courts developed specifically for the African natives as outlined in Bennett at page 139.

²⁴¹ Together with its Traditional and Governance Framework Amendment Act, 2009 (Act No. 23 of 2009)

²⁴² 211 deal with recognition of traditional leaders, customary law and traditional authority.

211(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

is not impossible since we have seen this happen in many court disputes²⁴⁴ relating to the application of customary law and customs.

Role and position of traditional authority read in s34

Section 212(1)²⁴⁵ of the Constitution envisaged traditional leadership with a role at local government level and not as the judiciary. Traditional leadership is an institution at local level addressing traditional matters affecting local communities which section 212 constitutionally entrenched the participation of traditional leadership²⁴⁶. The role of traditional leaders in terms of section 212 is limited to only participation and what legislation determines as the role for traditional houses. Chapter 12 does not entrench the recognition of traditional courts but provides for recognition and application of customary law and traditional leaders. However, it is without a doubt that traditional courts are a component of traditional authority in terms of customary law.

Section 212(2) of the Constitution pronounces that provincial and national legislation must be enacted to deal with houses of traditional leaders as having a role at provincial and national level but not a role with judiciary authority envisaged in sections 165 and 166 of the Constitution. To some degree chapter 12 of the Constitution has been complied with. However, in my view, the rationalisation of legislation on traditional courts in terms of schedule 16 items (1) and (6) has not taken place.

In the meeting of the Select Committee: Security and Constitutional Development on 12 February 2014, Mr J.B Skosana from the Department of Justice advised the Committee that the Department proposed that traditional courts' definition be altered to mean traditional councils. That might be a plausible solution which however, must still be rephrased to include all natives' courts structures and hierarchy as is lived or practised. However, what is a traditional council? A national council of traditional leaders established in terms of section 212(2)(b) constituted by traditional leaders with legal background from all over the country can be designated as a supreme court of traditional matters in the same manner as there is a Labour Appeal Court. Lets us start by defining a traditional court.

Clause 4 of the TCB provides that a traditional court must be presided by a king, queen or where the senior traditional leader so requests, the headmen, headwomen or a member of a

211(2) A traditional authority that observes **a system of customary law may function subject to applicable legislation and customs**, which includes amendments to, repeal of, that legislation or those customs.

211(3) The **courts must apply customary law** when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

²⁴³ Section 212 provides the role of traditional leaders

212(1) National legislation may provide for a role for traditional leadership as an institution at local government on matters affecting local communities.

In my construction this provision stipulates that traditional leadership is an institution located at local level to address traditional matters affecting local communities. The role that this institution must play at local level is to be determined through national legislation.

212(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

²⁴⁴ Mayelane v Ngwenyama and Minister of Home Affairs CCT 57/12 [2013] ZACC 14, Sigcawu and Bhe.

²⁴⁵ Sigcawu v President of the Republic of SA and Others CCT 84/12 para 5.

²⁴⁶ Paragraph 404 of the Certification 1996 judgment.

royal family who has been designated by the Minister of Justice as a presiding officer of a traditional court. This means traditional courts' presiding officers are kings²⁴⁷ or queens unless there is a request from the king/queen, that any other persons including royal women, headmen could be presiding officers once the Minister designates according to the request. The proposal of the Department that traditional councils be considered as traditional courts with the actual hierarchy could address related concerns better than the current clause 4.

A traditional council is a tribal authority and today tribal authority is traditional authority vested in the traditional leadership. The Black Authorities Act defined tribal authority as a Black tribal authority established by the State President under section 2 of this Act, which recognised authorities could later form part of government. This provision took into account the already existing legitimate traditional authorities. Chieftaincy or royalty never came from election²⁴⁸ but was conducted in terms of customs. The TLGFA defined traditional leadership as the customary institutions or structures or customary systems or procedures of governance, recognised, utilised or practised by traditional communities. A traditional leader is defined as any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of TLGF Act. A traditional council is defined by the TLGFA as a structure recognised by the premier of a province and established in terms of section 3.

Another challenge to clause 4 of TCB is that as the established traditional authority eventually forms part of the organs of state²⁴⁹ is non-election ascension to power as the senior traditional leader does comply with the necessary legitimacy demanded by democracy principles and the rule of law in respect of the judiciary independence and of the legislatures. I am in doubt. Constitutional principles xiii, xvi, xvii, xxiv permitted a deviation from democratic elections in respect of traditional leaders but these principles do not confer the judiciary authority or the executive authority to traditional leaders. Traditional leadership is constitutionally recognised despite its elements that breach the doctrine of separation of powers and political rights, but there is no constitutional provision that grants traditional authority the judicial power.

The "civilised vengeance" founded in section 34 of the Constitution is crucial when we consider the existence of traditional courts. Section 34 sets out a number of obligations on the state. Included amongst those, is the obligation to set up and provide necessary mechanisms for citizens to resolve disputes²⁵⁰. In providing those mechanisms the state must pay and source presiding officers and officials that must efficiently operate traditional courts as other tribunals or forums in terms of section 34. A right to access a court of law or a section 34 tribunal cannot be restricted unreasonably. It can only be limited in terms of section 36 of the Constitution since there is no other provision in the Constitution that permits such limitation. Until traditional courts are constitutionally established as section 34 tribunals or proper courts of law in terms of section 166(e) of the Constitution, such courts cannot have validity based on old order unconstitutional legislation.

In Chief Lesapo, Mokgoro J confirmed that the right of access to courts is the basis that forms stability and cause an orderly society which eliminates room for self-help. Access to

²⁴⁷ The GG No. 1027 dated 5 November 2010 list confirmed kings by the President.

²⁴⁸ Charmaine French, Functions and Powers of Traditional Leaders, Occasional Papers in Konrad-Adenauer-Stiftung, September 1994 at page 21, Ntsebenza, Holomisa.

²⁴⁹ See *Pilane v Pilane* ZANWHC case no. 263/2010 at para 21 read with 24.

²⁵⁰ *President of RSA and Others v Modderklip Boerdery (Pty) Ltd and Others* CCT 20/04 at para 39

courts prevents anarchy, vigilantism and chaos in society. Thus as important as courts of law are, the rule of law together with the right to access courts and other fair tribunals cannot be curtailed without profound justification for people in rural traditional societies. If vengeance is not controlled and regulated it has the potential to lead to societal destruction. If rural people want to operate under customary law and are deprived that self-determined wish, they can protest and lead the rural societies to destruction when they are not heard or given appropriate care. Such conduct shall destroy our hard earned democracy.

The examples Claassens mentioned deal with difficulties women experience in the operation of traditional courts. These include that of a lady who was forced by custom to "be in love" with the brother of her late husband or that lad who had to marry a man who raped and made her pregnant. When they complained to the most accessible structures and close to them they received no assistance because of the male domination and the way males perceive and promote the custom despite disregard for women and their rights and equity in life. Such continued conduct and disregard for constitutional rights of women would destruct and destroy our society. This fact illustrate that if government can provide an appropriate rationalisation of traditional courts, there are still a portion of the country that can benefit hugely and appreciate a well structured traditional justice system that complies with the Constitution.

The state is obliged to take reasonable steps to ensure that large scale disruptions in the social fabric find no life at all²⁵¹ and courts must have means to maintain and remove the undermining of the rule of law by curbing self-help and providing respectable and enforceable, appropriate and effective remedies. These state obligations are expected from government by all the South Africans despite the choice or uncontrollable forces that ground people to rural traditional locations.

The methods used to address situations of conflict in a court of law, like the recusal of the judge where there is perceived interest or conflicting interest, can also be utilised to prevent the biasness of the Chief. This can be done by enforcing the recusal principle applied in courts of law alternatively the matter could be referred to another jurisdiction of the traditional justice system or the English courts. The problem with enforcing the recusal principle may arise as legal representation is prohibited and the restricted right to appeal or review especially since grounds in clauses 13 and 14 of the TCB are technical and legal in nature. Section 35(3)(o) of the Constitution and the recusal principle applied correctly can address conflict of interest challenges.

The TCB does not provide complete overhaul of the traditional courts or proper rationalisation of legislation regulating their jurisdiction.

Unregulated societies breeds recipe for societal destruction which result in huge negative implications for societal stability and public peace. So as other rural traditional citizens wish to live according to customary law but are also entitled to equal protection of the law in terms of section 9(1) of the Constitution, the state is bound to provide traditional justice mechanisms in line with section 34 of the Constitution and not violate section 19 of the Constitution. This argument augments a form of constitutional pluralism.

²⁵¹ Para 43 Modderklip.

Section 39(2) of Constitution

Common law is known as law of the courts because and in terms of the Constitution the courts must develop it. There is a difference between altering²⁵² common law and developing it. The courts develop common law or customary law but they cannot alter them since that is the function of the legislatures. Sections 39²⁵³(2)²⁵⁴ or (3)²⁵⁵ of the Constitution do not diminish nor elevate any other form of the law above the other. Putting customary law and common law at par, there is no reason why both cannot be developed by courts and accorded the same developmental processes and codification where necessary.

I dispute in its totality that customary law as a living law is incapable to conform to the principle of legal certainty. The principle of the rule of law that rules must be stated in a clear and accessible manner²⁵⁶ can be incorporated to customary law by virtue of section 39 of the Constitution.

Customary law has always not complied with the principle of separation of powers and is not a specialised field of law²⁵⁷. The Constitutional Court has settled that there is no absolute separation of powers²⁵⁸. However, the doctrine of separation of powers and legal certainty in line with the supreme law must be observed, whenever development of customary law takes effect. People must be clear on what the law is.

The right in section 35(3)(l) of the Constitution demands that the offence must be an offence at the date it is committed not when you are charged. The state must not outsource its duties by empowering traditional authority to create offences at the time when the wrongdoer is alleged to have committed a crime, contrary to section 35(3)(l). If such outsourcing is to be lawful, it must be aligned with sections 35 and 39 of the Constitution. In traditional leadership setting such an anomaly is happening²⁵⁹. Finding the law when there is a transgression is unconstitutional and the TCB seem to be enabling such conduct despite that it contradicts the Constitution and its imperatives.

Traditional criminal jurisdiction

Let me point out that it is the BAA that provided the statutory jurisdiction of traditional courts and that Act has been partially repealed a number of times leaving only this part about jurisdiction active. The Black Authorities Act No. 68 of 1951 has never been repealed and is thus still operational with its definition of tribal authority.

A criminal is brought before the law through an arrest. A crime is a conduct which the law declares as unlawful and the criminal is a person who does what is prohibited in law. The

²⁵² Mukkadam (CC) at para 65 , 67-69 Froneman J dissent.

²⁵³ Section 39 of the Constitution provides the interpretation of the BOR and of any other law.

²⁵⁴ Sub-section (2) provides that ...when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

²⁵⁵ Provide that the Bill of Rights does not deny the existence of any other rights, freedoms that are conferred by common law, customary law or legislation, to the extent that they are consistent with the BOR.

²⁵⁶ Dawood and Another, Shalabi, Thomas and Another v Minister of Home Affairs 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 47.

²⁵⁷ Bennet: 26.

²⁵⁸ 1996 Certification para 108.

²⁵⁹ See Claassen's example where she alludes to communities' challenges and complaints of the arbitrary and unpredictable nature of accusations because the traditional leaders fail to apply the agreed customary law and people get to be told "you have broken a law" determined only when you are apprehended.

TCB Schedule provides a list of crimes that traditional courts have jurisdiction to try. For purposes of the TCB, I assume that both the arrested and accused person is vested with rights in section 35(3) of the Constitution.

Applying sections 43 and 44 of the Constitution, legislatures must determine statutory crimes within the jurisdiction of traditional courts but not contrary to the Constitution. The Constitution does not provide traditional authorities with the power to determine customary crimes. The design and provisions of the Constitution have precluded the creation or incorporation of new common law crimes and I believe the same applies to new customary law crimes or new customs.

According to section 37 of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), arrest means when a police officer or other state official takes under control the movements of another person or means the intention to bring the arrested person to justice²⁶⁰. So for TCB purposes arrest is the form to initiate the traditional justice system wherein there is either a complaint or a crime reported to the traditional authority and as such traditional administration of justice is triggered.

Bigamy²⁶¹, polygamy and incest²⁶² are crimes in the western cultures whereas polygamy and ukungena are very much acceptable and moral cultures of the Bantu people. Interestingly the Bible²⁶³ does not explicitly express whether or not it is a crime to be incestuous in a sense where there are brotherly or siblings' marriage relations like ukungena. Other cultures also do not have a moral issue with this conduct. Even within Bantu tribes some other differences exist.

In Xhosa Ngqika almost lost his chieftaincy, after he abducted his uncle's wife²⁶⁴. At times women are forced to follow this custom which renders women objects without feelings or intelligence. Clearly there is a challenge to harmonise the differing views on what becomes a crime on the basis of culture, religion or western law. Western law was unable to set a definite punishment for a crime like witchcraft, just like today; it may be difficult for the state to prove incest when two adults consent to the act but their lawful relations precludes them from engaging in such a consensual act.

The Transvaal Venda finds pre-marital sex socially and morally acceptable especially if it does not lead to pregnancy²⁶⁵. Such conduct is prohibited in other tribes like Zulus which

²⁶⁰ R v Malindisa 1961 (3) SA 380 (T).

²⁶¹ Section 237 of the Criminal Procedure Act, 1977 (Act No.51 of 1977)(CPA). The Roman-Dutch law reduced our culture to a crime and women involved in this to concubines as seen in Esop v Union Government 1913 CPD 133.

²⁶² Section 238 of the CPA

²⁶³ Genesis 38 verses 6 to 19, contrasted with Leviticus 18, Ezekial 22:11 and Deutoronomy 22:30. But a son may not marry his father's wife. With quoting some bible provision, in no means must this be taken as a presupposition that we are not a secular state. I am mindful that SA does not promote any religion over the other as a state, hence SA is a secular state.

²⁶⁴ The Gaiikas' tribe abandoned Ngqika as their chief for stealing his uncle Ndlambe's wife and he only got the paramount chief back through the British after the tribe denounced him: Soga at 45.

²⁶⁵ Davidson:71-72 "in Venda if a girl of age staying with her mother was called "afraid of men" because society expected a normal human behaviour that she should not be a procrastinator ("waddle about" but should be having a mudavdu (sweetheart) whom she ought to be making love to. This conduct is said to have allowed the stigma of illegitimacy and illegitimate children, which other tribes wish to eliminate and would not tolerate or teach to their young ones. The Venda people allowed the davhalu in Zulu what is called ukusoma where the male partner does not have sexual intercourse with the girl but only partial intercourse with the thighs of the girl. Both Venda and Zulus had the test for virginity for girls to ensure that men do not deflower them. Nudity is perfectly ok in

explains the preference for ukusoma or ukuhlolwa as opposed to having actual intercourse before marriage. With these examples how do we reconcile the constitutional system based on western values and indigenous cultures when values clearly conflict? Since incest is a crime under English law, how will traditional courts reconcile the ukungena custom and the statutory crime? The challenge is not irreconcilable values but because of the overlap and human race virtues that are made prominent over those of the others²⁶⁶ arguments of irreconcilability may arise. However a pluralistic approach and compliance with the Constitution can reconcile the irreconcilable.

Section 35 of the Constitution presents accused, arrested and detained persons with rights that the TCB takes away. The entrenched rights are denied by the TCB through enabling the accused persons to be tried by the traditional courts²⁶⁷ whilst legal representation and right to appeal are unfairly restricted. The violation of section 35(3) of the Constitution by the TCB is likely to be invalidated by the Constitutional Court.

Concluding views

I administer the view that traditional courts should be administrative justice tribunals within section 34 of the Constitution. Furthermore in terms of section 212(2)(b) a national traditional council of traditional leaders can be established and declared as the Supreme Court of Appeals in respect of customary matters. This is because such interpretation gives appropriate effect to the obligations in schedule 6 item 16, section 237 and chapter 8 of the Constitution.

The rationalisation of traditional courts' legislation is a public power. Hence the state is bound by the Constitution when exercising state power and must comply with constitutional imperatives including the principle of legality²⁶⁸.

Section 166(e) of the Constitution stipulates that the courts include any other court established or recognised in terms of an Act of Parliament. This section refers to courts of law. Schedule 6 item 16(1) is the constitutional provision that grant continued jurisdiction of the traditional courts. The Repeal Act of the Black Administration Act, 1927 and Amendment of Certain Laws Amendment Act, (Partial Repeal Act) and other old order legislation not repealed yet, also find jurisdiction of traditional courts but not in terms of section 166(e). The national council as a supreme court of appeal on customary matters can be located under section 166(e) of the Constitution.

The BAA only empowered the Minister to delegate criminal and civil jurisdiction to a traditional court but did not create traditional courts as courts of law. Even the Constitutional Court²⁶⁹ did not declare them as courts of law, but said the interpretation of s166 (e) could be read to cover them or permit their establishment as such courts. The court held the view that section 166 did not preclude the establishment or continuation of traditional courts.

The constitutional obligation in terms of schedule 6 item 16(6) and section 237 enjoins the rationalisation amongst others, of the traditional courts, as soon as practical after the new

Bantu cultures as it actually confirms that the girl has not been deflowered, whereas in western cultures this would be seen as obscene.

²⁶⁶ Chanock:2000

²⁶⁷ Jurisdiction determined for traditional courts by clauses 5 and 6 read with the TCB's Schedule.

²⁶⁸ International Trade Administration Commission v SCAW South Africa Pty Ltd 2011 (5) BCLR 457 (CC)

²⁶⁹ Certification judgment 2006 at 199

Constitution took effect, with a view to establishing a judicial system suited to the requirements of the new Constitution which government has up to so far failed to address properly. The Partial Repeal Act provides continued ministerial conferred jurisdiction of traditional courts. Until the Repeal Act is repealed its force and effect has perpetual existence to maintain lawful jurisdiction of traditional courts in terms of the BAA. The criminal jurisdiction of the TCB is unconstitutional if it extends to minors and if legal representation is prohibited.

It is misleading and vague to stipulate that “traditional courts are distinct from the courts referred to in section 166(e) of the Constitution” as done in the TCB. The Bill should explicitly stipulate whether traditional courts are administrative bodies that must be operated in terms of PAJA. It is strange that it does not either make them s166 (e) courts or define them as PAJA structures. In that light the TCB draft disregards the principle of legality.

Cabinet approved the traditional courts policy by determining unclearly what traditional courts are in clause 3(1)(d) read with clause 7 of the TCB. Cabinet (Minister of Justice in particular) and the Select Committee on Security and Constitutional Development in 2012, by introducing the TCB ushered in the TCB towards being law contrary to the dictates of the Constitution. Both the Executive and Parliament have failed the constitutional obligation to rationalise and recognise traditional courts in terms of section 237 read with 166(e) and schedule 16 of the Constitution, speedily.

The Minister of Justice together with Cabinet collectively²⁷⁰, since Cabinet approved both the TCB and the policy on traditional courts prior to the Bill's introduction in Parliament, have failed the constitutional duty in terms of schedule 6 item 16(6) of the Constitution. Schedule 6 item 16(6) provides that all courts **including traditional courts** (my emphasis) must be rationalised with a view to establish a judicial system suited to the requirements of the Constitution.

It is my view that traditional courts system cannot be made part of the judiciary system unless all the requirements of a judicial officer are complied with and unless legal representation is not unduly and unconstitutionally restricted with the exception of appointments for judges of the national traditional council that becomes traditional supreme appeal court.

The limitations provided by clause 5 of the TCB to restrict civil jurisdiction, are plausible but require strengthening. Considering all the developments and speciality required in addressing child justice and civil protection of children according to section 28 of the Constitution, there must be an express exclusion of child justice by traditional courts both for civil and criminal jurisdiction.

The current TCB is highly contested even though as only a legislative proposal. However, if either Parliament rejects it or changes the current content completely through listening to peoples' submissions, the will of the people and democracy principles can prevail.

Many TCB clauses illustrate how misleading the Bill is and that its intended consequences may not be achieved. It is misleading to call the structures recognised by the TCB as traditional courts when in effect such bodies are different from courts created in terms of section 166 of the Constitution. Clauses 5, 6, 9, 10, 12, 13 14, and relevant 21 of the TCB on procedure and functions of the envisaged structures mislead as well, since such powers and

²⁷⁰ S 85(2)(b),(e) and 92(2) of the Constitution

functions are equivalent and inherent to those the section 166 of the constitution's courts possess. The TCB makes it plain that traditional courts as envisaged are not courts of law, but it does not make sense why call them traditional courts instead of some name that refers to them as an administrative body or an alternative dispute resolution mechanisms established through statute.

Clauses 13 and 14 of the TCB, declares traditional courts as lower or below the magistrates' courts. If section 35(3)(o) provides a right to appeal or review by a higher court and clause 7 of the TCB declares traditional courts distinct from state courts mentioned in section 166 read with clause 3(1)(d) of the TCB, it is safe to conclude that traditional courts are not courts of law but are an alternative dispute resolution mechanism below the rank of district magistrates' courts. That is an acceptable and constitutional approach which must be clearly expressed in the legislation.

Should it be statutory recognised that traditional courts are courts as envisaged in section 166(e) of the Constitution my preference would be to refer to them as customary justice tribunals in terms of section 34 rather than the term traditional courts. I submit that an appropriate name shall maintain and bring about the distinction that clause 7 of the TCB attempted but failed.

Interestingly the SALRC's Customary Courts Bill in clause 2(2) endorsed the reality and wishes of some people that these courts are courts of law and should be respected as such for the work that they do. I disagree with the arguments of the SALRC²⁷¹ that customary courts should be courts of law.

The manner the current TCB is proposed is inconsistent with the Constitution, but then again it is clear that Cabinet also does not favour traditional courts becoming courts of law. In terms of the constitution's supremacy principle confirmed in *In Re: The National Education Policy Bill No 83 of 1995 1996 (4) BCLR 518 (CC)* at paragraph 16 that any law or conduct inconsistent with the Constitution is "of no force and effect" and must be declared to be invalid to the extent of the inconsistency. I have no doubt the TCB shall be declared inconsistent with the Constitution and invalid once challenged in the Constitutional Court. A lot of work must be done in the current text and content of the TCB in order for it to pass constitutional muster.

I am convinced that customary justice tribunals need not be recognised as courts of law but their recognition and continued existence is constitutionally protected as administrative/adjudicative justice bodies in terms of schedule 6 item 16(1) and (6) or existing enactments could be repealed applying schedule 6 item 2(1) of the Constitution.

²⁷¹ Project 90 of the South African Commission on Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders at Chapter 2.

Chapter 7

Recommendations²⁷²

Since the application and use of customary law is an optional personal choice that allows any individual to be a master in his or her personal arena, the self-determination right, the tribal settlements people must be allowed the option to either opt in or opt out of the customary law justice system. The jurisdiction of this system must not be imposed because that would amount to unlawful outsourcing of public power. It becomes the unlawful outsourcing of judicial power in respect of traditional courts in that the Constitution empowers judicial officers in terms of chapter 8 of the Constitution to hold the judicial authority and administer justice according to the law. Customary law can be made to apply nationally as long as the litigants are happy with such decision considering the distinction between the opt in²⁷³ choice, which is constitutional in the sense that a person is not coerced to be part of the system that may have implications to entrenched rights, and the “opt out” option, which contrary to the democratic supreme legal order, that once law is declared or recognised as constitutional.

If native courts are declared administrative bodies but not the courts of law, the existing NHTL²⁷⁴, Provincial Houses of Traditional Houses²⁷⁵ and Local Houses of Traditional Leaders can in addition to their legislated roles and functions be allocated the function to review or address appeals or reviews emanating from traditional law implementation and complaints about traditional leadership. Alternatively there can be a newly established structure in terms of section 212(2)(b) of the Constitution as a Traditional Matters Supreme Court of Appeals.

However incorporation of women participation through these structures as appeal bodies need be legislated specifically within the NHTL Act, to address the historical challenge where women had not been senior leaders as per the definition in TLGFA and decision makers. This arrangement shall give effect to the policy as determined at page 37 of the 2002 Draft Policy on Traditional Leaders. We need to bear in mind that there are times where the NHTL did not taken the opportunities granted²⁷⁶ to influence decisions in promotion of the interest of indigenous people, which is why I propose inclusion of other traditional houses to the structures that will become appeal or review bodies of the work done by traditional courts which will be administrative bodies.

A common mode of appointment in traditional leadership setting is that which is hereditary. There are non-hereditary appointment methods where a community elects their traditional leadership structures, for example the election of traditional councils' members. Both methods can be incorporated and properly regulated to allow continued constitutional

²⁷² Questions asked in the Discussion Document on Traditional Leaders and Institutions assisted in guiding my recommendations.

²⁷³ Dr Sindiso Mnisi Weeks, Technical Discussions of Substantive Issues in the Traditional Courts Bill, Law, Race and Gender Research Unit, University of Cape Town

²⁷⁴ NHTL has 18 members and is an existing statutory body with complimentary infrastructure and resources provided by the national government.

²⁷⁵ Provincial Houses are established in six provinces namely Eastern Cape (20 members), Free State (15), kwaZulu-Natal (76), Mpumalanga (21), Northern Province (36) and North West (24). Gauteng has two traditional councils but no provincial house and the Western Cape has no traditional leadership.

²⁷⁶ Court's concern in Bhe: 106, where the Chairperson of the NHTL failed to submit an input to the question of polygamous marriages.

hereditary chieftaincy and democratic involvement and appointment of suitable persons but not necessarily limiting appointment to royal descent.

Also once disputes and legitimacy on traditional leaders is sorted there shall be no need for election processes since these appointments can remain on the hereditary line inclusive of both men and women.

Exclusion of women due to the male hereditary succession is unconstitutional and should be abolished. Customary law must be changed through legislation in order to create consistency with the Constitution and generally permit women to be traditional rulers where they are born from the royal houses or where they have the competency and through choice by the people.

Traditional leadership retirement possibilities and age should be incorporated into law so that, succession mechanism can be used to groom properly the next traditional appointment whilst the actual appointment is still alive and present to transfer knowledge and preparation for chieftaincy to avoid positional disputes.

If there must be state intervention through legislation it must be done in complete account of circumstances within customary law and must incorporate appropriate and sufficient public participation. In *Shilubana*²⁷⁷ the court correctly found that customary law can be properly developed by traditional authorities together with their subjects and courts could be secondary developers. When the traditional settlements people are primary developers of customary law and courts become secondary, when the matter is brought to the judiciary for litigation, such instance can work better. Thus I recommend in agreement that traditional societies and traditional leaders should be primary customary law developers and courts should be secondary developers in order to address a structured and balanced development of customary law by courts and communities.

Ousting of legitimate traditional leaders by past regimes lead to the distorted and contested traditional leadership hence government and communities must transform and regulate traditional system consistently with the Constitution. All traditional leaders are subject to the Constitution and legislation. I argue that traditional leaders do not have the competence to administer justice because that is an exclusive competence for national government. Therefore provincial legislation dealing with traditional leaders implementing traditional justice must be done away with for purposes of determining national uniformity in line with section 44(2) of the Constitution. Traditional courts as courts of law with judicial authority should be scrapped instead a policy and legislation that declares traditional courts as administrative bodies must be enacted.

State regulation must be certain, uniform, readily available and coherent but most importantly consistent with the Constitution. Once there is a legislative framework that satisfies constitutional requirements there shall be no need to promote legitimate or illegitimate traditional leaders. A lot of state funds has been misplaced and misused in attempts to ascertain true and legitimate leadership. The process through commissions has not resulted in productive and efficient correction of the past and satisfactory justification and resolution to existing chieftaincy disputes. Thus I propose that legislative regulation must take place to direct where to from here, without further waste of the public funds through unyielding commissions.

²⁷⁷ *Shilubana v Nwamitha* 2008(9) BCLR 914 (CC) at paras 48 - 75

Known and applied customs that are inconsistent with the Constitution must through legislation be expressly suppressed and removed from recognition and practise by repeal from the authorised legislature.

The Commission for the Promotion and protection of the Rights of Cultural, Religious and Linguistic Communities together with the Human Rights Commission must give proper effect to their statutory functions and must promote the rights of cultural communities.

Referendum

Considering the severe critique for lack of consultation and possibly, failure to reach people in rural areas, a referendum that may be coupled with the upcoming elections, scheduled to take place on 7 May 2014, for the national and provincial government, is the best platform to hear what the masses say. President may call a referendum in terms of section 84(2)(g) of the Constitution and section 2(2) of the Electoral Commission Act, 1996 (Act No. 51 of 1996). The referendum may be for the whole Republic or be limited to the provinces that have traditional communities in order to save the state resources and conducted. Failing which a referendum can be conducted any other time in terms of the Referendums Act, 1983 (Act No. 108 of 1983).

Human dignity embodies ability to love, respect and form a relationship of friendliness as humans, which sets us apart from animals, in sharing the value of ubuntu, we are able to distinguish the wrong and good conduct. The law dictates that acting contrary to this moral aspect is the basis of crimes against humanity. Actions that erode the human race, exploit the honour of human beings and fail to promote communalism are human crimes and if let to prosper may destroy the constitutional order we have obtained. The traditional justice system must recognise and respect the rights entrenched in the Constitution if it must exist as an appropriate pluralist order parallel to the Constitution.

Traditional justice can also function properly as legal order in its own right, subject to the Constitution as long as it is given chance to evolve and conform through application in courts. I argue that not giving due recognition to traditional justice system and enable public scrutiny then the government is sowing divisions and promoting western culture over the African culture²⁷⁸ failing to appreciate that a traditional justice system can perfectly compliment the criminal justice system. The divisions are already in existence, where others are guided by a system different to that of others, whilst the necessary infrastructure is not provided to allow development and progress of the traditional system (the wrong outsourcing).

Declaring traditional courts as not courts of law in terms of section 166(e) is a justified government policy decision. But be that as it may, traditional people must still be allowed to exercise what they hold dear and the powers of the traditional leaders must not be curtailed without regard and provision of efficient mechanisms to enable rural peoples' lives to move forward.

The Traditional Administration Centres were meant to be administered by government in rural areas of KwaZulu Natal but are found to be dysfunctional in the worse scenario even than the assistance that people get from the traditional councils and traditional authorities. Elected councillors do not offer much far better than does the traditional councillors in rural

²⁷⁸ Maluleka

areas. Government is yet again in this realm failing people in the rural areas and wasting public funds.

Government should conduct sufficient and honest research to ascertain which traditional authorities are truly working towards the development of their communities and through the Public Finance Management Act, 1999 (Act. No1 of 1999) must provide appropriate and lawful financial assistance and remuneration in terms of section 219(1)(a) of the Constitution to all traditional leadership structures. Traditional authorities must be given prominence and legislative recognition as well as appropriate remuneration in order to continue as other mechanisms promoting justice in terms of section 34 and 33 of the Constitution.

Conclusion

The TCB did not take into account the living customary law. It is a mere abstract construction of customary law system which seems to lack background research from people in tribal settlements. The wasted expenditure on many drafted bills costing the hungry and resulting in wasteful expenditure is concerning. The government only allures traditional people through an empty promise to garner votes. Government does not want to recognise traditional courts appropriately but use this piece as a vote collector under the wrong notion that as citizens and people loving customary law, citizens have no minds and have made no observations in the past 20 years of democracy.

As early as 1994 Charmaine French²⁷⁹ argued issues critical regarding the indigenous authority system. Amongst others, she included lacking prescriptions to the manner the traditional authority should fulfil their duties. The TCB still fails to address this concern as clause 4 only captures how the senior traditional leader is designated to be the presiding officer and others must be at the mercy of the king or queen. Clause 4 does not give effect to the object of the TCB, which is to seek to provide easy accessible justice if you must wait for the king who is overseas or attending to other royal important matters because the close headwomen cannot be the presiding officer if the senior leader has not requested further determination of the available induna.

The bill does not state how these structures should uniformly function but leaves it for determination in the regulations. The state has failed to take precise action or provide mechanisms to address misconduct of tribal authorities and tribesmen. The bill does not set up a structure to which the aggrieved persons may approach to file complaints against their traditional leaders to address concerns on civil and criminal jurisdiction that is inappropriately granted, but it requires writing of affidavits. Who are the commissioners that shall be accessible for the tribal settlers to commission the affidavits? The drafters of the bill did not have the plight of rural people in mind when it was drafted and presented twice to Parliament in exactly the same state without so much to even change dates.

The administrative law failed to include traditional authorities as administrative authorities that can be reviewed under section 33 of the Constitution. The traditional courts should be established as administrative bodies distinct from courts of law. The object to provide easy access to justice is further diminished or perished by lack of proper structures to address fall out cases or appeals.

²⁷⁹ Charmaine French: 22 and the recent writings of Anika Classens, Nomboniso Gasa and Sindiso Mnisi Weeks.

The Constitution provides cultural rights, access to court of choice, political rights but those rights are not protected for the benefit of indigenous people, if there is no proper regulatory uniform framework for traditional courts. There exist clear ambivalence for the place and role for traditional leaders within government. The government policy on traditional leadership is been unclear even before the democratic government came into power in 1994²⁸⁰.

If proper recognition of all cultures for South Africans creates floodgates, then we are no closer to achieving the visions that Langa CJ envisioned in *MEC for Education, Kwazulu-Natal and Others v Pillay*²⁸¹ and proper cultural diversity²⁸² recognition.

After almost twenty years of democracy, South Africa must be the society envisaged by the Constitution. People are not against application of customary law and practices but are concerned with that which seems unconstitutional and perpetuated through the TCB. I agree with the late Langa CJ in *Bhe*²⁸³ that the courts may not be the best forum to primarily develop customary law because change might be slow and prolonged if the courts take charge, and there could be different solutions to different challenges that communities may find. It is best to enable people to develop the customary law themselves because it is theirs but the state must provide the necessary safeguards.

The government driven development of customary law is slow and done in piecemeal indeed. It is already spelling irreversible disasters²⁸⁴. Courts of law are best placed to develop and apply customary law during litigation. The judiciary community and the legislative community working hand in hand with the executive community are likely to address a challenge from different paradigms²⁸⁵. The three branches of government must with one voice establish traditional courts that are alternative dispute resolutions mechanisms serviced with proper infrastructure including a proper record system as administrative bodies. In that way the living customary law will be recorded and archived for record purposes and accessibility as well as proper scrutiny during judicial review.

²⁸⁰ The ANC policy guidelines provided as early as 1992 acknowledged the importance and role of traditional leaders. It acknowledges the role of unifying people and playing ceremonial roles and advisory to Parliament and not even the Executive, on matters relevant to customary law (Oomen 1996:103). The ruling party and its policies do not bring legal certainty, which why we see the worrying waste of expenditure in any process done in relation to rationalise traditional courts.

²⁸¹ 2008 (1) SA 474 (CC) at para 107.

²⁸² *Prince v Law Society*

²⁸³ *Bhe* paragraphs 110-115.

²⁸⁴ Consider Dalindyebo criminal case and the lost lives with their properties.

²⁸⁵ *Rv Secretary of State for social Securty ex part Council for the Welfare of Immigrants* discussed y Jonathan Sumption Q.C in *Judicial and Political Decision –Making the uncertain boundary*, 2011

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Traditional Courts Bill: Clauses relevant to the thesis

Clause 3

3(1) In the application of this Act, the following principles should apply:

... (b) the need to promote access to justice for all persons; (c) the promotion of restorative justice measures; (d) **the enhancement of the quality of life of traditional communities through mediation**; (e) **the development of skills and capacity for persons applying this Act in order to ensure the effective implementation thereof**; and (f) **the need to promote and preserve African values which are based on reconciliation and restorative justice**.

Clause 7: Nature of traditional courts

7. Traditional courts **are distinct from courts referred to in section 166** of the Constitution, and operate in accordance with a system of customary law and custom that seeks to- (a) prevent conflict; (b) maintain harmony; and resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

Clauses 9 and 10

9(3)(a) **No party to any proceedings before a traditional court may be represented by a legal representative.**

Unless there is an appeal or review application the order of the traditional court is final and binding.

Clauses 13 and 14:

Parties in a traditional court case can appeal or apply **for procedural review to the magistrate's court.**

Clause 20

20. Any person who-

(a) wilfully insults a presiding officer during the proceedings of a traditional court; or (b) wilfully interrupts the proceedings of a traditional court or otherwise misbehaves himself or herself in the place where proceedings are held; or (c) having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence and liable on conviction to a fine. ...

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